NYP Acquisition Corp. and its alter ego NYP Holdings, Inc. *and* Newspaper Guild of New York, Local No. 3 of The Newspaper Guild, AFL–CIO. Case 2–CA–26935

October 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On December 6, 1996, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel, the Respondents, and the Charging Party filed exceptions, supporting briefs, and answering briefs, the Respondents filed a brief in support of the judge's decision, and the Respondents and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below and to adopt the recommended Order.

The complaint alleges that the Respondents, NYP Acquisition Corp. (Acquisition) and NYP Holdings, Inc. (Holdings) are alter egos, a single employer, and successors to The New York Post Co., Inc. (Post Co.). The complaint also alleges that the Respondents violated Section 8(a)(3) of the Act by terminating and refusing to reinstate striking employees represented by the Charging Party Newspaper Guild (the Guild). The complaint further alleges that the Respondents violated Section 8(a)(5) by withdrawing recognition from and refusing to bargain with the Guild, and by unilaterally changing the terms and conditions of employment of Guild employees.

The judge found that the Respondents were alter egos, but that Acquisition was not a successor to Post Co.; that therefore Holdings also did not have any duty to bargain with the Guild deriving from its status as an alter ego of Acquisition; and that Holdings had a right to hire a new work force when it purchased the Post Co. assets and did not have a duty to reinstate the strikers. Accordingly, the judge found that the Respondents did not commit the violations alleged and recommended that the complaint be dismissed. We agree with the judge's ultimate conclusion that the complaint should be dismissed. Unlike the judge, however, we find that Acquisition and Holdings are not alter egos; consequently, we find it unnecessary to pass on whether Acquisition was a successor to the Post.

Facts

The relevant facts are discussed in detail in the judge's decision. In essence, they are as follows. The New York Post is a daily newspaper in New York City. The Guild represents a bargaining unit of employees in the Post's editorial, advertising, circulation, publication, and business departments.

In early 1993,[2] the Post was at the brink of collapse. It was losing money at an average rate of $300,000 a week. Post Co., which owned the Post, filed for bankruptcy on March 15.

At that point, Rupert Murdoch, the owner of a worldwide multimedia empire, appeared on the scene.[3] Murdoch was interested in purchasing the Post, and incorporated Acquisition on March 25 as a subsidiary of one of his other holdings, News America Publishing, Inc. (NAPI), to manage the paper while the possibility of purchasing it was explored. Acquisition was also to supply financing to the debtor in possession[4] (Post Co.), and was envisioned to be a possible purchaser of the Post.

Murdoch's purchase of the Post was not a foregone conclusion, however. To begin with, there was a legal

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In considering the General Counsel's contention that Respondents NYP Acquisition Corp. and NYP Holdings, Inc., together with News America Publishing, Inc. (NAPI), constitute a "single integrated employer," the judge inadvertently stated that the complaint alleges only that Respondents NYP Acquisition Corp. and NYP Holdings, Inc. are a single employer. In fact, the complaint alleges that the Respondents are alter egos as well as a single employer.

In the course of the same discussion, the judge declined to analyze the relationship between the concepts of alter ego and single employer found in *Johnstown Corp.*, 313 NLRB 170, 172 (1993), remanded sub nom. *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994). We note that after the judge issued her decision, the Board issued its decision on remand from the court of appeals in *Stardyne*. The Board held that alter ego is not a subset of the single employer concept, but rather that alter ego and single employer are related, but separate, concepts. *Johnstown Corp.*, 322 NLRB 818 (1997). We find the single-employer analysis inapplicable here since the instant case does not involve two ongoing businesses coordinated by a common master. *NLRB v. Hospital San Rafael, Inc.*, 42 F.3d 45, 50 (1st Cir. 1994).

[2] Unless otherwise noted, all dates refer to 1993.

[3] Murdoch's corporate holdings are described more fully in the judge's decision. For simplicity's sake, we shall refer to them collectively as "Murdoch," since he exercises de facto control over all of them.

[4] Under Federal law, when a debtor files a bankruptcy petition, it becomes a debtor in possession by operation of law. A debtor in possession is a fiduciary that holds the estate's assets and operates its businesses for the benefit of creditors, subject to the supervision of the bankruptcy court. *Collier Handbook for Trustees and Debtors in Possession* (1989), par. 20.05, cited in *Cone-Heiden Corp.*, 305 NLRB 1045 fn. 4 (1991).

obstacle that had to be surmounted before any deal could be consummated. NAPI owned television station WNYW in New York City, and because the cross-ownership rules of the Federal Communications Commission (FCC) prohibited NAPI from owning both a television station and a major newspaper in the same market, NAPI could not purchase the Post without first persuading the FCC to waive the cross-ownership rules.[5] In addition, economies had to be achieved in the operation of the paper if a purchase was to make sense financially. Finally, any purchase agreement would have to be approved by the bankruptcy court.

In late March, NAPI asked the bankruptcy court judge to approve documents under which Acquisitions would manage and finance the Post. On March 29, the bankruptcy court judge approved those documents. They included a management agreement, which allowed Acquisition to manage the Post; a loan agreement under which Acquisition would provide debtor in possession financing; and a security agreement. The management agreement explicitly contemplated that Acquisition could seek the approval of the bankruptcy court to purchase the paper's assets. It also provided that Acquisition would have "full business and editorial control." The agreement also provided that Acquisition had the authority to hire and fire any employee and (subject to the relevant provisions of the bankruptcy code, prior consultation with Post Co., and the approval of the bankruptcy court) to modify, terminate, or renegotiate any collective-bargaining agreement. The agreement further stated that Acquisition would use its best efforts to obtain a waiver of the FCC's cross-ownership rules allowing Acquisition to acquire the business.

Acquisition began managing the Post on March 29. As manager, it exercised complete editorial, administrative, and financial control over the paper. All employees, including the Guild employees, continued to work under the existing terms and conditions of employment as set forth in their respective collective-bargaining agreements. However, NAPI announced that, before it would buy the Post, it would have to obtain significant concessions from the unions representing all of the paper's employees, including the Guild.

Soon after Acquisition assumed control of the Post, NAPI began negotiating with the unions for new contracts containing the desired concessions. Initially, progress in negotiations proved elusive, and Acquisition shut the paper down for 2 days in July. Negotiations soon resumed, however, and NAPI shortly reached agreements in principle with 10 of the unions. However, the negotiations with the Guild never bore fruit, and no agreement was ever reached.

NAPI was seeking concessions from the Guild in several areas, but there were two issues that presented what proved to be insolvable problems. First, NAPI wanted a probationary period during which management could evaluate all Guild employees and terminate any employee without recourse to the grievance procedure (or any third party review) and without severance pay. Second, NAPI did not want to be obligated to honor the severance pay obligations that had arisen under the previous owners. Those obligations were potentially significant, amounting to some $7 million for all Guild employees. NAPI was adamant on achieving those aims. The Guild was equally adamant in refusing to agree to any contract that did not provide for third party review of any dismissal action or that did not continue the existing severance pay obligations. Although the parties bargained in good faith from May through September, they never reached agreement on those two subjects.

Meanwhile, on June 29, the FCC granted the crucial waiver of its cross-ownership rules. And, as noted above, NAPI reached agreements in principle with the unions other than the Guild by midsummer. Murdoch's purchase of the Post now appeared to be a more plausible outcome. However, as manager of the paper, Acquisition had to make financial reports to other parties, including the committee that represented Post Co.'s creditors. NAPI decided that the purchase should be made by an entity that did not have Acquisition's reporting responsibilities and whose records were not subject to scrutiny by third parties. Therefore, on July 12, NAPI incorporated a new subsidiary, Holdings, to purchase the Post. The officers and directors of Holdings were almost identical to those of Acquisition.

Holdings and Post Co. then negotiated an asset purchase agreement under which Holdings would acquire certain assets and take on certain liabilities of Post Co. On August 6, a motion was filed in the bankruptcy court seeking the court's approval of the asset purchase agreement. On September 14, the bankruptcy court approved the agreement.

The Guild announced a strike deadline of September 27 at 4 p.m. On that day, before 4 p.m., the negotiators met again, but neither side changed its position on the critical issues of evaluations and severance pay. The NAPI negotiators told the Guild negotiators that Holdings would not go through with the purchase if the Guild struck and the paper was not published. In a later meeting which included the officers of the other Post unions, the parties' negotiators reiterated their respective long-

[5] Indeed, NAPI had owned the *Post* from 1976 through 1988, but sold it because of the cross-ownership rules.

held positions. The Guild's chief negotiator, Barry Lipton, stated that the Guild employees would never work without third party review of dismissals during the evaluation period. The NAPI's negotiators stated that Lipton's statement amounted to a declaration of impasse.

At 4 p.m. on September 27, the Guild established a picket line outside the Post facility, proclaiming a strike against the Post. Although the other unions had voted not to support the strike, members of those unions refused to cross the picket line, and the paper was not published on either September 28 or 29. Murdoch and the Post's publisher, Patrick Purcell, decided to close the paper. On September 28 and 29, Lipton asked Purcell if the parties could resume bargaining in order to end the strike. Purcell replied each time that it was too late because Murdoch had decided to close the Post.

Later on September 29, the heads of the other unions asked Lipton to attempt to persuade the striking Guild members to return to work, but were unsuccessful. They then approached Purcell and asked him if he would reopen the paper if the unions other than the Guild went back to work. After consulting with Murdoch, Purcell told the other unions that if their members returned to work, Holdings would go forward with the purchase and exercise its right as a new employer to hire a new white-collar work force. The unions agreed, their members returned to work on September 30, and the Post resumed publication. On September 30, Holdings informed the Guild that if the purchase went through, it would be hiring a new work force, for which it would establish initial terms and conditions of employment.

On October 1, Holdings bought the assets of the Post Co. pursuant to the terms of the asset purchase agreement. Holdings signed new collective-bargaining agreements with the unions other than the Guild, and their members were hired without having to apply for employment.

On October 4, the Guild made an unconditional offer to return to work on behalf of all the striking Guild employees. Holdings replied on October 5 that it was accepting applications for employment, and suggested that any questions concerning the Guild's offer be directed to the Post Co., as the employer of the Guild employees. Holdings required Guild employees to fill out employment applications. Numerous Guild employees were hired, but they made up less than a majority of the employees hired for positions formerly represented by the Guild. The terms and conditions of employment under which they were hired were different from those existing before October 1 and from those in any of NAPI's various offers to the Guild during negotiations, including its final offer. Holdings has not recognized or bargained with the Guild since October 1.

The Judge's Decision

The judge rejected the General Counsel's contention that Acquisition was a successor to the Post Co. with an obligation to recognize and bargain with the Guild beginning March 29. The judge relied chiefly on *Fremont Ford Sales*,[6] which she read as requiring that, before a prospective purchaser can be found to be a successor with a bargaining obligation, there must be "a written contract of sale . . . and a precisely defined interim management period, during which the manager exercises effective control in its own name and which will be used to fulfill mere formalities." Because she found that neither of those conditions was met in the case of Acquisition, the judge found that Acquisition was not a successor to Post Co. and therefore did not have an obligation to bargain with the Guild. She also found that, even if Acquisition did have a bargaining obligation, it did not violate Section 8(a)(5) by refusing to bargain on September 28 and 29 because the parties were at impasse and the Guild had not indicated that it was willing to change its negotiating position.

The judge went on to find that Holdings was a successor to Post Co. and the alter ego of Acquisition. However, she found that, as a successor, Holdings had the right to announce that it would hire a new work force under new terms and conditions of employment. Having exercised that right, Holdings would not have a bargaining obligation unless a majority of the employees whom it hired in the former Guild unit were former Guild-represented employees.[7] As that condition was not met, the judge found that Holdings did not violate Section 8(a)(5) by failing to recognize the Guild and by unilaterally changing terms and conditions of employment.

The judge found that Holdings did not violate Section 8(a)(3) by failing to reinstate the striking Guild employees after October 4 because those individuals had never previously been employed by Holdings. She also found that, although Holdings did not require any employees other than those represented by the Guild to apply for jobs, it did not unlawfully discriminate against the striking Guild employees by requiring them to fill out applications because, unlike the employees represented by the other unions, the Guild employees had not agreed with the NAPI negotiators on new terms to be applied once the purchase was concluded.

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[6] 289 NLRB 1290 (1988).

[7] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

The Parties' Exceptions

The General Counsel and the Guild argue that the judge erred in finding that Acquisition was not a successor to Post Co. They also contend that she erred in failing to find the violations alleged in the complaint. Respondents Acquisition and Holdings argue that the judge erred in finding them to be alter egos. The Respondents also contend that the strike was unprotected because it was in violation of a contractual no-strike commitment. They further argue that the Board is bound by the bankruptcy court's rulings which, the Respondents contend, preclude a finding that Holdings is obligated to bargain with the Guild.[8]

Discussion

1. The Respondents are not alter egos

Contrary to the judge and our dissenting colleague, we find that the General Counsel has failed to establish that Holdings and Acquisition are alter egos.

Two enterprises will be found to be alter egos where they "have substantially identical management, business purpose, operation, equipment, customers and supervision as well as ownership." *Advance Electric*, 268 NLRB 1001, 1002 (1984), quoting *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982), enf. denied 716 F.2d 1014 (4th Cir. 1983). As the Board noted in each of these cases, it is also relevant to consider whether the alleged alter ego was created for the purpose of evading bargaining responsibilities. See also *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

Here, we find that the evidence is insufficient to demonstrate that Acquisitions and Holdings possess a common business purpose. Although Acquisition and Holdings both published the newspaper, we find that they did so with markedly different business purposes.

Acquisition's primary role was to serve as a manager of the operations in an attempt to preserve assets by keeping the operation viable. Of critical importance in this regard is the context in which Acquisition assumed control of the Post. The paper was bankrupt and was losing, on average, some $300,000 per week. It would have been closed immediately had Murdoch not rescued it. And once closed, the Post probably could never have been saved. As the judge found, in a city like New York, where there are several competing daily papers, one of those papers cannot cease operations for very long and expect to resume operations later as a viable entity. That is because its readers and advertisers will quickly switch to its competitors, leaving little chance of resuscitating the paper when it reopens.

There was also considerable uncertainty, especially when Acquisition began managing the newspaper, but later as well, over whether Murdoch would ever purchase the paper.[9] Part of that uncertainty arose because it was unclear whether the unions would agree to new employment terms. In fact, NAPI had made so little progress in negotiations with the unions by early July that it closed the paper for 2 days. Nor was it assured in March that the FCC would waive its cross-ownership rules to enable Murdoch to buy the Post or that NAPI and Post Co. could agree on the terms of an asset purchase agreement that the bankruptcy court would approve. Thus, at the time Acquisition took over the management of the Post, it was unclear whether it, or any Murdoch subsidiary, would ever own the Post.

In contrast to Acquisition's managerial role, Holdings' role was solely that of the purchaser. That is, after Holdings was selected as the purchaser, and after it was approved by the FCC, the interim functions of Acquisition were completed. Holdings could then run the newspaper as a purchaser and directly own the Post's equipment. In sum, the difference between Acquisitions and Holdings is the difference between (1) a company with an interim and limited purpose, and (2) a finalized buyer with a normal commercial purpose.

Our colleague argues that the phrase "business purpose" refers simply to the kind of business in which the companies are engaged. Thus, for her, a newspaper is a newspaper, and that ends this facet of the inquiry. We disagree. In our view, it is overly simplistic to say that the two have a common purpose simply because they both ran a newspaper or that it used the same equipment despite differences in their ownership status. In this regard, we note that the phrase is "business *purpose*" (emphasis added). If the task were simply to compare "businesses," the word "purpose" would not be part of the phrase. Secondly, there is a separate term ("operations") which includes the nature of the business.[10] This

[8] Because we find that the Respondents did not violate the Act in failing to reinstate all of the Guild strikers and by imposing new terms and conditions of employment, we need not address their affirmative defenses.

[9] It is undisputed that NAPI would not have purchased the Post under the employment terms that existed in March. The NAPI negotiators made it clear from the beginning that unless they achieved significant concessions from the unions, including the Guild, Murdoch would not go through with the purchase. Had Holdings not been able to implement new terms, then, it would not have purchased the Post, and the paper would have folded, probably for good.

[10] This contrasts with determining the existence of successor status, where the Board applies the lesser standard of a "substantial continuity of the same business *operations*" (emphasis added). *Banknote Corp. of America*, 315 NLRB 1041, 1048 (1994); *Brand Mid-Atlantic Inc.*, 304 NLRB 853 (1991). The Board requires a closer identity between two entities for alter ego status because of its greater consequences: a successor assumes only the obligation to recognize and bargain with the

is not to say that, in the usual case, business purpose will not be similar to business operation. See, e.g., *A&P Brush Mfg. Co*., 323 NLRB 303, 308 (1997) ("The purpose of both [entities] was to manufacture paint brushes."). But, for the reasons discussed above, the instant case is clearly not the usual case. Cf. *Blazer Corp*., 236 NLRB 103, 109–110 (1978) (purchaser was not the alter ego of receiver or debtor-in-possession because purchaser was running "vital, vibrant, and growing manufacturing enterprise" in contrast to receiver's "skeleton holding" operation).[11]

As indicated above, another relevant factor is whether the entities were created for an antiunion motive. Here, there is no allegation or evidence that Holdings and Acquisition were created with an antiunion motive. Thus, this factor also does not support finding alter ego status.[12]

Accordingly, for the reasons stated above, we find that Acquisition and Holdings were not alter egos.

2. The Respondents did not violate Section 8(a)(3)

We agree with the judge's finding that the Respondents did not violate Section 8(a)(3) of the Act as alleged. As we stated at the beginning of this decision, the complaint alleges that the Respondents violated Section 8(a)(3) of the Act by terminating and refusing to reinstate striking Guild employees.[13]

In support of this allegation, the General Counsel contends, inter alia, that Holdings violated Section 8(a)(3) by failing to afford all of the Guild strikers their *Laidlaw* right to immediate reinstatement when they offered to return to work on October 4. We find no merit in that contention. We have found above that Holdings was not the alter ego of Acquisition. Thus, even assuming arguendo that Acquisition was a successor of Post Co.,[14] Holdings as a new purchaser had the right to hire a new work force, as well as to set new terms of employment. *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). That right would be meaningless if Holdings had an obligation to reinstate all of the strikers. We therefore find that Holdings' failure to reinstate the strikers was not inconsistent with *Laidlaw*.

The General Counsel also argues, in the alternative, that Holdings refused to employ the majority of the Guild strikers because of their strike activity, and thus that its conduct violated Section 8(a)(3) by retaliating against the strikers for engaging in protected concerted activity. We find no merit in this argument.

To begin with, we find no evidence of discriminatory motive on the part of Holdings.[15] Holdings informed the Guild on September 30, before Holdings purchased the Post, that if the purchase went through, it would be hiring a new work force and setting new terms and conditions of employment. At that time, the Guild employees were still on strike. The timing of Holding's announcement is evidence in itself that, by hiring a new work force, Holdings was simply exercising its rights as a new purchaser rather than retaliating against the strikers.

Nor do we find that Holdings' requiring strikers, but not nonstrikers, to apply for employment "bears 'its own indicia of [discriminatory] intent.'"[16] As of October 1, the former Post employees, except for the strikers, were working under terms which NAPI had negotiated with their unions. By contrast, the Guild had stated repeatedly that the strikers would never work under the terms proposed by NAPI. In those circumstances, Holdings could only believe that it had to employ a new work force if it wanted to publish the Post. Thus, when Holdings announced that it would hire a new work force, it was, in effect, announcing that it was doing the only thing it

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exclusive bargaining representative of its predecessor's employees; an alter ego is required to assume its predecessor's collective-bargaining agreement as well. See *Joe Costa Trucking*, 238 NLRB 1516, 1522 (1979); *Blazer Corp.*, 236 NLRB 103, 109 (1978).

[11] We note that the fact pattern here is similar in many respects to that in *Specialty Envelope Co.*, 321 NLRB 828, 829 (1996). In *Specialty Envelope*, Peters as receiver was a successor to Western Paper Products. Later, Peters incorporated Speciality Paper Products and was its sole owner. As here, Peters assumed the responsibility of receiver with the intention of attempting to purchase the assets of Western himself. Yet, in that case, the General Counsel did not even contend that Peters and Specialty were alter egos.

[12] Member Hurtgen also notes that an alter ego is often described as the "disguised continuance" of the other company. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In this instant case, nothing was disguised. Full disclosure was made to all concerned parties as well as the bankruptcy court.

[13] By alleging that the Respondents terminated the striking Guild employees, the General Counsel apparently refers to Holdings' September 30 announcement to the Guild that, if it purchased the assets of Post Co., it would be hiring a new work force.

[14] The judge found that Acquisition while managing the Post continued the Post's operations with the same employee work force doing the same jobs under the same working conditions. Nevertheless, as indicated above, the judge concluded that Acquisition was not a successor employer to the Post under *Fremont Ford,* supra. We have substantial doubts as to the correctness of the judge's finding and the judge's discussion of *Fremont Ford* in light of the Board's more recent decision in *Specialty Envelope Co*., supra, which issued shortly before the judge's decision. However, we find it unnecessary to resolve this issue in view of our finding that Holdings was not the alter ego of Acquisition.

[15] The General Counsel does not contend that Holdings discriminated against any of the individual strikers, e.g., by hiring less qualified applicants in preference to more qualified strikers. He contends instead that, by requiring them, and only them, to apply for employment, Holdings treated the strikers *as a group* differently from the other Post employees, because of their strike activity.

[16] *NLRB v. Great Dane Trailers*, 388 U.S. 26 at 33 (1967).

could do under the circumstances. Later, of course, the Guild employees offered unconditionally to return to work. We do not believe, however, that Holdings was required to change its mind simply because the strikers changed theirs. We therefore do not find that Holdings demonstrated retaliatory intent by implementing its previously announced decision to hire a new white-collar work force.

For all of the foregoing reasons, we find that Holdings did not act unlawfully by failing to reinstate all of the Guild strikers.

3. Holdings did not violate Section 8(a)(5)

The complaint also alleges that the Respondents violated Section 8(a)(5) by withdrawing recognition from and refusing to bargain with the Guild, and by unilaterally changing the terms and conditions of employment of Guild employees. Since we have found that Holdings was not the alter ego of Acquisition, we must determine whether Holdings had any obligation to bargain with the Guild as a successor employer.

The *Burns*[17] test for determining whether a successor has an obligation to bargain with the exclusive bargaining representative of its predecessor's employees is: (1) whether the majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer and (2) whether the new employer conducts essentially the same business as its predecessor. *GFS Building Maintenance, Inc.*, 330 NLRB 747, 751 (2000). We have found, as discussed above, that Holdings' lawfully declined to hire a majority of the new white-collar work force from among the former Post employees. Consequently, we agree with the judge that Holdings did not violate Section 8(a)(5) by failing to recognize or bargain with the Guild after October 1. We shall therefore dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER FOX, dissenting.

On the facts of this case, it seems plain to me that when Respondent NYP Acquisition Corp., a subsidiary of the media empire controlled by Rupert Murdoch, assumed full business and editorial control of the New York Post in March of 1993, retained all of the Post's employees without change in their conditions of employment, and continued to operate the paper in the same manner that it had been operated by The New York Post Co., it became a legal successor to the Post Co. with an obligation to recognize and bargain with the Newspaper Guild of New York as the exclusive representative of employees in the Post's editorial, advertising, circulation, publication, and business departments. It seems to me also clear, under well-established Board precedents, that NYP Holdings, Inc., another wholly owned subsidiary of the Murdoch empire with substantially the same ownership, management, business purpose, operation, equipment, supervision and customers, is an alter ego of Acquisition, and that when it acquired and assumed responsibility for operation of the Post in October of 1993, it had the same legal obligations to the Guild and to employees represented by the Guild as Acquisition. I would therefore find, contrary to the majority, that the Respondents violated Section 8(a)(1), (3), and (5) of the Act when, following Holding's purchase of the Post, Holdings withdrew recognition from the Guild, terminated Guild-represented employees who were engaged in a strike, and refused to reinstate them upon their unconditional offer to return to work.

Background

The essential facts of the case are not in dispute. As set forth in the judge's decision, the New York Post, a daily tabloid published in New York City, was owned from 1976 through 1988 by News America Publishing, Inc. (NAPI), one of numerous worldwide subsidiaries of the media conglomerate News Corporation Ltd. which are controlled by Rupert Murdoch. A Murdoch-controlled subsidiary also owned a New York City-based television station, WNYW (Channel 5). In 1988, because of Federal Communication Commission cross-ownership rules, which prohibited Murdoch from owning both a newspaper and a television station in the same market, the Post was sold to The New York Post Co., Inc., owned by Peter Kalikow. The paper, which had been operating in the red for some time, continued to incur substantial losses and on March 15, 1993, after two spectacularly unsuccessful attempts by others to acquire and "save" the paper, the Post Co. filed for bankruptcy. At that point Rupert Murdoch reappeared on the scene.

As found by the judge, Murdoch wished to reacquire the Post and had been given reason to believe—accurately, as it turns out—that the FCC was likely to grant a waiver of its cross ownership rules that would allow him to own the Post without having to divest himself of station WNYW. In order to effectuate his plan on March 25, 1993, a new subsidiary of NAPI was incorporated by the name of NYP Acquisition Corp, with Murdoch as chairman of the board, NAPI President and CEO Patrick J. Purcell as president, and other NAPI board members completing the slate of officers.

As the name reflects, a primary purpose for which Acquisition was created was to be the vehicle through

[17] Supra, 406 U.S. 272 (1972).

which Murdoch would reacquire ownership of the Post. Indeed, it was on the assumption that if there were a purchase, it would be done in the name of Acquisition, that Murdoch's representatives sought (and in June of 1993 obtained) the hoped-for waiver of the FCC's cross ownership rule.[1] A second purpose for which Acquisition was formed was to keep the Post afloat as a going concern[2] while the Murdoch operation pursued the three conditions on which it made clear that its reacquisition of the Post was contingent: (1) the FCC's granting of the waiver of the cross-ownership rules, (2) approval by the bankruptcy court of a purchase agreement, and (3) negotiation of new collective- bargaining agreements with the 11 unions representing Post employees containing concessions sufficient to achieve certain savings deemed necessary before Acquisition would go through with the purchase. In accordance with that second purpose, Acquisition sought, and on March 29[3] the bankruptcy court approved, a management agreement under which Acquisition would manage the Post and provide interim financing to the Post to keep it going.

The management agreement gave Acquisition "full business and editorial control" over the Post, including complete control over the Post's day-to-day labor relations. Under the agreement, Acquisition made all financial decisions with respect to the operation of the Post and funded the Post's losses, which were in excess of $300,000 a week. The management agreement also provided, inter alia, that Acquisition could seek the court's permission to sell the paper's assets to itself or to another purchaser, with or without Post Co.'s permission.

Acquisition took over and began running the Post on March 29. All employees were retained, and no changes in existing terms and conditions of employment were announced. On that date, NAPI also initiated negotiations with the Guild and the other Post unions. NAPI sought three significant concessions from the Guild: freedom to subcontract unit work, relief from the accrued severance pay obligations of the predecessor employers, and a 6-month probationary period during which it could terminate Guild employees without severance pay and without the termination decision being subject to the grievance/arbitration process or any sort of third-party review. The Guild strongly opposed the latter two provisions, and although the parties bargained for several months, they never reached agreement on those issues.

Despite the lack of progress in the Guild negotiations, by mid-summer NAPI had reached agreements in principle with the 10 other unions representing Post employees. In addition, as noted above, the FCC had granted the necessary waiver of the FCC's cross-ownership rules. With those conditions fulfilled, Murdoch's representatives made the decision to go ahead with the purchase of the Post notwithstanding their inability to reach agreement with the Guild. In a change from its original plan, NAPI decided not to use Acquisition as the vehicle through which it would acquire ownership of the Post, since Acquisition had obligations under its management agreement to make reports and disclose financial information which NAPI preferred to keep confidential. Thus, on July 12, NYP Holdings—with directors and officers virtually identical to those of Acquisition—was incorporated as a new subsidiary of NAPI to carry out the purchase of the Post. Thereafter, on August 6, a motion was filed in the bankruptcy court for approval of a proposed Asset Purchase Agreement providing for the sale of the assets of Post Co. to Holdings. The sale was approved by the bankruptcy court by order of September 14.

On September 27, the Guild struck the Post, and the paper was not published for 2 days. Murdoch initially decided to close the paper because of the strike. However, when the other 10 unions crossed the Guild's picket line and returned to work on September 30, he relented and announced that Holdings would go through with the purchase and exercise its right as a new employer to hire a new white-collar work force. On September 30, Holdings informed the Guild that, if it purchased the Post's assets, as a new employer it would be hiring a new work force and would announce initial employment terms. On October 1, Holdings purchased the paper's assets pursuant to the terms of the asset purchase agreement. It hired all of the employees represented by the non-Guild unions, under the terms negotiated with those unions.

On October 4, the Guild took down its picket line and made an unconditional offer on behalf of the strikers to return to work. Holdings informed the Guild that it was hiring a new work force and that the strikers would have to apply for employment along with other applicants. A large number of the strikers were hired, but by no means all of them, and those who were hired did not make up a majority of the new white-collar work force. The new terms and conditions of employment differed from those in effect before October 1 and from those contained in NAPI's previous bargaining proposals. Holdings has not recognized or bargained with the Guild since October 1.

[1] See FCC decision of June 29, 1993 (CP Exh. 3) granting waiver to permit Fox Television Stations, Inc. (another Murdoch subsidiary) to continue to own station WNYW in the event that the New York Post was acquired by NYP Acquisition, Inc.

[2] As the judge found, the Post's potential value to Murdoch was only as a continuing enterprise, since once the paper closed, readers and advertisers would be expected to go elsewhere, and it would be highly unlikely that the paper could be revived.

[3] Unless otherwise stated, all dates refer to 1993.

1. Acquisition was a successor to Post Co.

It is well settled that a change in the identity of an employing entity does not, of itself, relieve the new employer from an obligation to recognize and bargain with the union that represented the predecessor's employers.[4] As set forth in *Fall River Dyeing*,[5] the test developed by the Board and sanctioned by the Court for determining whether a successor employer inherits the bargaining obligations of the predecessor is whether there is "substantial continuity" between the enterprises:

> Under this approach, the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

In addition, "[I]n conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'" Id.

Applying this test to the circumstances here, it is clear that Acquisition was a successor to the Post Co. Upon assuming control of the Post on March 29, Acquisition continued to publish the paper at the same location, using the same employees doing the same jobs under the same working conditions, using the same production process, apparently for the same customers, as had the predecessor. There can be no doubt that, from the employees' perspective, their job situations were essentially unaltered.

It is true, of course, that the Post was still owned by the Post Co. But as the Board and the courts have made clear, the absence of a transfer of ownership is not dispositive of whether a successorship situation exists. As the Board explained in *Maintenance, Inc.*[6]

> The duty of an an employer who has taken over an "employing industry" to honor the employees' choice of a bargaining agent is not one that derives from a private contract, nor is it one that necessarily turns upon the acquisition of assets or assumption of other obligations usually incident to a sale, lease, or other arrangement between employers. It is a public obligation arising by operation of the Act. *The critical question is not whether Respondent succeeded to [the predecessor employer's] corporate identity or physical assets, but whether Respondent continued essentially the same operation, with substantially the same employee unit whose duly certified bargaining representative was entitled to statutory recognition at the time Respondent took over*. [Emphasis added.][7]

In *Maintenance, Inc.*, the Board found that a company awarded a contract to perform custodial work at NASA's Marshall Space Flight Center which hired most of the prior contractor's employees to perform essentially the same work they had previously performed was a successor to the prior contractor with an obligation to bargain with the union that had represented the prior contractor's employees, even though the new company had not acquired any assets or other interests of the prior contractor. In numerous similar cases, the Board and the courts have found new employers to have successor obligations to unions that represented the predecessor's employees notwithstanding the absence of *any* dealing between the successor and the predecessor. See, e.g., *Tom-a-Hawk Transit*, *Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969) (new company incorporated to provide municipal bus service after financial collapse of old company). Indeed, *Burns* itself is just such a case.[8]

Not surprisingly, the Board has also had no difficulty finding successorship where there have been dealings between the successor and the predecessor, but there has not been a transfer of ownership. Thus, in *East Belden Corp.*,[9] the Board adopted an administrative law judge's decision which relied on *Maintenance, Inc.* to find that an employer that had signed an agreement to purchase a restaurant owned by a unionized predecessor employer was a successor with a bargaining obligation even though it was only managing the restaurant during an escrow period during which certain contingencies were to be satisfied. Similarly, in *Sorrento Hotel,*[10] the Board found

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[4] *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

[5] 482 U.S. at 43.

[6] 148 NLRB 1299, 1301 (1964).

[7] See also *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980) (stating that "while a transfer of assets may be evidence of the requisite continuity of business operations, it has not been thought to be a necessary condition," and noting that more than one authority has characterized it as a "make-weight").

[8] As the Supreme Court noted in *Burns*,

> Here there was no merger or sale of assets, and there were no dealings whatsoever between [the predecessor employer] and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from [the predecessor] and became liable for none of its financial obligations. Burns merely hired enough of [the predecessor's] employees to require it to bargain with the union as commanded by Sec. 8(a)(5) and Sec. 9(a).

406 U.S. at 286.

[9] 239 NLRB 776 (1976), enfd. mem. 634 F.2d 635 (9th Cir. 1980).

[10] 266 NLRB 350 (1983).

that an employer that operated a hotel under an interim management agreement pending the conclusion of negotiations for a long-term lease of the premises was a successor with a bargaining obligation. More recently, in *Specialty Envelope Co.*,[11] the Board found that a receiver appointed by a state court to manage a failing company's day-to-day operations was an employer and a legal successor to the company whose operations he was running.

In concluding that Acquisition was *not* a successor to Post Co., the judge here relied on *Fremont Ford Sales*,[12] which she read as establishing a rule that a prospective purchaser cannot be found to be a successor with a bargaining obligation unless there is both a written purchase agreement and an interim period in which the prospective purchaser exercises control and in which only "mere formalities" are to be fulfilled. I agree with the General Counsel that the judge erred in her reading of that case.

As noted above, in determining whether successorship can be found, the critical inquiry is not whether there has been a transfer of assets, or whether a transfer of assets is being contemplated, but whether, from the standpoint of the employees, there is substantial continuity between the predecessor employer and the successor. In *Fremont Ford*, the Board stated that the existence of written agreements to purchase or lease and "an escrow or interim management period officially established for the prospective buyer or lessee to take control" were "salient facts triggering successorship status" in *East Belden* and *Sorrento Hotel*, but the Board did *not* say that they were requirements in the sense that under no other circumstances could successorship be found. Contrary to the judge, neither did the Board say that where, as here, there is an interim management period officially established in which a prospective buyer assumes effective control of the predecessor employer's business, successorship will not be found unless only "mere formalities" need to be fulfilled. The point in *Fremont Ford* was that in that case there had been *no* interim period in which the prospective purchaser managed the car dealership. Indeed, as the Board emphasized, at the time the administrative law judge erroneously found the prospective purchaser to have become a successor, the prospective purchaser was not yet in existence and the dealership was still owned and being operated by the predecessor.

In this case, of course, Acquisition did have a court-approved management agreement under which it was functioning as the employer of the Post's employees. The management agreement gave Acquisition extensive powers to operate the newspaper, independently of Post Co. Thus, as we have already noted, the agreement gave Acquisition "full business and editorial control," which it unquestionably exercised from the time it took control until the date of the asset sale to Holdings. Indeed, Acquisition twice made the decision to close down the Post; in both instances, apparently, the decision was made because Acquisition's own efforts to take over the business seemed to be foundering. Acquisition had the authority, subject to prior consultation with Post Co. and the approval of the bankruptcy court, to modify, terminate, or renegotiate collective-bargaining agreements. Finally, Acquisition had the authority, with or without Post Co.'s consent, to seek the bankruptcy court's approval to sell the assets of Post Co., either to itself or to another purchaser.

To be sure, there was always the possibility that Acquisition would only operate the Post temporarily due to the chance that Murdoch would not, in the end, acquire the assets of the Post. But as was stated in *East Belden*, "even though an employer may only be operating a business temporarily, it does not privilege the employer to ignore the provisions of Section 8(a)(5) of the Act." 239 NLRB at 792. Here, consistent with the management agreement giving Acquisition "full business and editorial control," Acquisition, effective March 29, became the Post employees' employer. And having made the decision to retain the Post's employees without change in their conditions of employment, it was legally obligated to recognize and bargain with their chosen representatives.

2. Acquisition and Holdings were "perfectly clear" *Burns* successors

An employer that substantially continues its predecessor's business and hires employees of the predecessor as a majority of its work force is a successor with an obligation to bargain with the union that represented those employees when they were employed by the predecessor.[13] The Supreme Court in *Burns* held that a successor employer normally is free to set initial terms and conditions of employment unilaterally. The Court also stated, however, that there would be times when it is "perfectly clear" that the successor intends to hire all of the predecessor's employees. In those circumstances, the successor may not impose initial terms without first bargaining with the union representing the employees.[14] In *Spruce Up Corp.*,[15] the Board held that an employer should be found to be a "perfectly clear" successor, with an obliga-

[11] 321 NLRB 828 (1996), enf. denied on other grounds sub nom. *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998).

[12] 289 NLRB 1290 (1988).

[13] *NLRB v. Burns Security Services*, 406 U.S. at 280–281; *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. at 43.

[14] Id. at 294–295.

[15] 209 NLRB 194 (1974), enfd. mem. 529 F.2d 516 (4th Cir. 1975).

tion to bargain over initial employment terms, only when it has either actively or tacitly misled employees into thinking that they will all be retained without a change in terms and conditions of employment, or when it has invited the predecessor's employees to accept employment without announcing its intention to set new conditions.[16]

The record clearly establishes that Acquisition was a "perfectly clear" successor to Post Co. When Acquisition assumed the management of the Post on March 29, it retained all of the Post's employees without change in their terms and conditions of employment. Acquisition therefore had an obligation to bargain with the Guild before changing employment terms. It could not lawfully announce new terms and conditions of employment without first bargaining with the Guild.

3. Holdings and Acquisition were alter egos

The Board normally will find that two nominally separate employers are alter egos if they have substantially identical ownership, management, business purpose, operation, equipment, customers, and supervision. The Board also considers whether the purpose of creating the alleged alter ego was to avoid an employer's responsibilities under the Act.[17] The latter factor, however, is not critical to the finding of an alter ego relationship.[18] Indeed, none of the above factors, taken alone, is the sine qua non of alter ego status; each case must turn on its own facts.[19]

In this case, although there is no evidence that Holdings was created for the purpose of evading Acquisition's responsibilities under the Act, the remaining factors plainly establish that the two companies were alter egos. As the judge found, Acquisition and Holdings are wholly-owned subsidiaries of NAPI, and had substantially identical management, operations, equipment, customers, and supervision. Holdings and Acquisition also had an identical business purpose: to publish the New York Post. Thus, except for the lack of a purpose to evade responsibilities under the Act, all of the factors supporting a finding of alter ego status are present here.

In finding that the two entities are not alter egos, the majority asserts that Holdings and Acquisition did not in fact have a common business purpose because Acquisition's "primary role" was to serve as manager of the Post's operations, while Holding's role was "solely that of the purchaser." Their position ignores both well-established principles as to what constitutes a "business purpose" for purposes of alter ego analysis, and the actual functions performed by Acquisition and Holdings.

First, for purposes of alter ego analysis, the Board has consistently regarded an employer's business purpose as being the production or provision of the products or services which the employer is in business to produce or provide. Thus, for example, in *A&P Brush Mfg. Corp.*,[20] the Board found that "[t]he purpose of both [employers] was to manufacture paint brushes." Similarly, in *Weinreb Management*,[21] the Board found that "Both entities have the same business purposes: to provide service and maintenance to buildings owned by the Weinreb family." Again, in *O. Voorhees Painting Co.*,[22] the Board stated that, "in finding that Voorhees and O.V. do not have a common business purpose, we rely particularly on the fact that O.V.'s business–i.e., remodeling–is broader than that of Voorhees–i.e., painting." Here, the purpose of both entities is to publish the New York Post.

Second, even if it were conceded that *operating* the Post and *owning* the Post are two different business purposes, those purposes were not in fact separated in the case of Acquisition and Holdings. Thus, as I have noted, Acquisition was created not just for the purpose of operating the Post to keep it afloat while Murdoch was attempting to secure the conditions necessary for him to acquire it, but also to be the vehicle through which Murdoch acquired the Post. Conversely, Holdings was created not just to be the owner of the Post, but also to operate the Post once it was acquired, and Holdings did in fact take over operation of the Post from Acquisition in October when the sale of the Post was completed.

My colleagues cite no authority for the novel proposition that having a business purpose to operate the New York Post and having a business purpose to own and operate the New York Post constitute separate business purposes for purpose of alter ego analysis. *Blazer Corp.,*[23] on which they rely, avails them not at all. There, the Board found that two bankrupt corporations and the company that purchased their assets were not alter egos because neither was the alter ego of the receiver in bankruptcy.[24] The Board based its holding, however, on the fact that (unlike this case) the scope and manner of the receiver's activities were materially different from both those of the bankrupt corporations and those of the purchaser. Specifically, the corporations designed, manufactured, and sold air conditioning equipment, while for the most part the receiver only sold

[16] 209 NLRB at 195.

[17] See, e.g., *Advance Electric*, 268 NLRB 1001, 1002 (1984).

[18] *Goodman Piping Products v. NLRB*, 741 F.2d 10, 12 (2d Cir. 1984).

[19] See, e.g., *Sobeck Corp.*, 321 NLRB 259, 266 (1996); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581–582 (6th Cir. 1986).

[20] 323 NLRB 303, 308 (1997).

[21] 292 NLRB 428, 431 (1989).

[22] 275 NLRB 779 (1985).

[23] 236 NLRB 103 (1978).

[24] I find this dubious proposition in any event.

such equipment out of inventory. Thus, although the Board implicitly found a difference in business purpose between the corporations and the receiver, it did not rely on any distinction between those entities' roles as owners and receiver/manager.[25]

Finally, even if it were true that Acquisition and Holdings did not share a common business purpose, it would still be proper to find them to be alter egos on the basis of their common ownership, management, operations, equipment, customers, and supervision. I therefore would find, in agreement with the judge, that the Respondents are alter egos.

4. Holdings stands in the shoes of Acquisition

The conclusion that necessarily follows from finding Acquisition and Holdings to be alter egos is that Holdings stands in the shoes of Acquisition with regard to Acquisition's bargaining obligations. As discussed above, when Acquisition retained all of the Guild employees under unchanged terms and conditions of employment, it gave up its right as a successor to hire a new work force and to impose terms and conditions of employment without bargaining. Holdings, then, as Acquisition's alter ego, did not have the right to act as a new employer, hire a new work force, and set unilaterally initial terms and conditions of employment. To the contrary, Holdings, by stepping into the shoes of Acquisition, was required to bargain in good faith with the Union as the employees' bargaining representative and to continue in effect the existing terms and conditions of employment.[26]

It is beyond question that if Acquisition, rather than Holdings, had ultimately bought the Post, Acquisition would not have been deemed a new entity with the right to unilaterally impose new terms and conditions of employment in October after having retained the Post's work force under existing terms when it took over as manager in March. See *East Belden Corp.,* 239 NLRB 776, 793 (1978) (successor employer, which had retained predecessor's work force under existing employment terms violated Section 8(a)(5) by subsequently making unilateral changes in those terms). And because Holdings was the alter ego of Acquisition, and thus the same employer under the Act, it also could not impose new terms when it actually did purchase the paper without bargaining with the Union.[27]

5. The Respondent violated Section 8(a)(5) by unilaterally establishing new employment terms on and after October 1

At the time Holdings assumed ownership and management of the Post, Murdoch's representatives had been bargaining with the Guild for months and had reached a good faith impasse at least by September 27. Holdings therefore would have acted lawfully had it implemented the terms of NAPI's final offer.[28] However, Holdings did not simply impose the terms for which NAPI had contended in negotiations. Instead, it added a significant new condition that had never before been suggested: that the striking Guild employees would not be retained, as were the employees represented by all of the other unions, but would have to apply for employment as members of a new work force. That condition was not "reasonably comprehended within [NAPI's] pre-impasse proposals,"[29] and accordingly could not lawfully be unilaterally implemented. I therefore find that Holdings' imposition of this term violated Section 8(a)(5).

6. Holdings violated Section 8(a)(3) by failing to reinstate the Guild strikers

Because Holdings was the alter ego of Acquisition, it was legally the same employer as Acquisition. Consequently, although the Guild employees went out on strike when Acquisition was managing the Post, and unconditionally offered to return to work after Holdings had purchased the paper, their actions were directed toward the same employer for purposes of the Act. As economic strikers who had not been permanently replaced, the strikers were entitled to immediate reinstatement.[30] I therefore agree with the General Counsel that Holdings violated Section 8(a)(3) by failing to reinstate all of the strikers.[31]

I also agree with the General Counsel that, even if the strikers had no right to automatic reinstatement, Holdings nevertheless violated Section 8(a)(3) by retaliating

[25] Id. at 109–110.

[26] In light of the fact that NAPI had bargained in good faith to a lawful impasse with the Union on September 29, Acquisition, and therefore Holdings, could have lawfully implemented the terms and conditions contained in NAPI's final offer. Holdings, however, unilaterally imposed terms that were different from those previously offered to the Union.

[27] In *Specialty Envelope*, supra, there was no finding that the two successors, Peters and Specialty, were alter egos. Here, by contrast, Acquisition and Holdings were alter egos; therefore, as I have shown, if Acquisition was a "perfectly clear" successor, so was Holdings.

[28] See, e.g., *Fire Fighters*, 304 NLRB 401, 402 (1991).

[29] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Televisions Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[30] As the General Counsel notes, the Respondent does not contend that it hired permanent replacements for the strikers.

[31] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–380 (1967).

against them for engaging in protected conduct. The NAPI negotiators had bargained to impasse over severance pay and termination without recourse to third party review during an initial probationary period. Holdings could lawfully have implemented the terms contained in its final proposal and let the Guild employees decide whether to work under those conditions. Instead, Holdings required all of the strikers to apply for employment as new employees, even though it imposed that requirement on no other former Post employees. The General Counsel contends, and I agree, that this discrimination against the Guild employees violated Section 8(a)(3), because it was in retaliation for their protected decision to strike rather than agree to the terms which the Respondents were demanding. I find that this discrimination was inherently destructive of the employees' right to strike and to bargain collectively through the Guild.[32]

7. The Respondents violated Section 8(a)(5) by failing to recognize and bargain with the Guild after October 1

After October 1, Holdings hired a white-collar work force of which a majority were individuals who had not formerly worked for the Post. Normally, an employer that does not hire, as a majority of its work force, employees of its predecessor does not have an obligation to bargain with the incumbent union.[33] That principle depends, however, on the employer's not having unlawfully discriminated in the hiring process. As I have found, all of the striking Guild employees were entitled to immediate reinstatement when the Guild, on their behalf, made an unconditional offer to return to work. Having unlawfully failed to reinstate all of the strikers, Holdings cannot base its failure to recognize and bargain with the Guild on the fact that a majority of its white-collar work force were not former employees of Post Co. And, as I have also shown, even if Holdings had no duty to reinstate the strikers, it still violated Section 8(a)(3) by discriminating against the Guild strikers in the hiring process. Consequently, I find that, but for the unlawful discrimination, Holdings would have hired a majority of its work force from among the former Post Co. employees, and therefore that Holdings had an obligation as a *Burns* successor to recognize and bargain with the Guild.[34] Under either theory, Holdings violated Section 8(a)(5) by failing to recognize and bargain with the Guild after October 1.

[32] *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967).

[33] *NLRB v. Burns Security Services*, 406 U.S. at 280–281.

[34] *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981).

8. The Respondents' affirmative defenses are without merit

The Respondents contend that certain rulings of the bankruptcy court preclude the Board from finding that Holdings had an obligation to bargain with the Guild. They also contend that the Guild strike was unprotected because it violated the Guild's collective-bargaining agreement with Post Co. Neither of these contentions has merit.

a. The decisions of the bankruptcy court do not preclude the Board from finding that Holdings had a bargaining obligation

In the course of the Post Co. bankruptcy proceedings, the bankruptcy court made certain rulings that, according to the Respondents, preclude the Board from finding that Holdings was a successor to Post Co. That contention does not withstand scrutiny.

To begin with, the Board has long held that it is not barred from litigating an issue involving enforcement of Federal labor law that a private party litigated unsuccessfully, if the Board was not a party to the earlier litigation.[35] The Board was not a party to the Post Co. bankruptcy proceedings. For that reason alone, the Board is not barred by the bankruptcy court's rulings from finding that Holdings had a bargaining obligation.

In any event, contrary to the Respondents, the principles of collateral estoppel, or issue preclusion, do not foreclose the Board from finding that Holdings had a bargaining obligation. Those principles apply only to issues that have (1) actually been determined (2) by a court of competent jurisdiction.[36] Neither of those requirements has been met here.

First, the record clearly indicates that the issue of whether Holdings would have an obligation to recognize and bargain with the Guild was not before the bankruptcy court. The actions of the court cited by the Respondents belie their contention that the court either considered or decided that issue.[37] Those actions were:

- The court's order in March, before Acquisition began managing the Post, that Acquisition would

[35] *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Service Employees v. NLRB*, 982 F.2d 845 (2d Cir. 1993); *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir. 1997), cert. denied 118 S.Ct. 1299 (1998).

[36] See, e.g., *Montana v. United States*, 440 U.S. 147, 153 (1979); see also *Precision Industries*, 320 NLRB at 663.

[37] *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), and *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), cited by the Respondents, are distinguishable. In both of those cases, the precise issue before the Board (whether a contract existed) was the same as the one that had been previously decided by the court.

not be liable to the creditors, including the Guild, for performance of the management agreement;

- The court's September 14 ruling, as part of its approval of the asset purchase agreement, that, except as provided in the agreement, the assets should be sold "free and clear of any and all liens, claims, charges, encumbrances, mortgages, pledges, security interests and any other interest in such Purchased Assets";
- The court's September 14 ruling that, except as provided in the asset purchase agreement, Holdings should not be "deemed to be or liable as a successor–in-interest to the Debtor for any claims, liabilities, damages or causes of action with regard to the Purchased Assets, which arise from or relate to the period prior to the Closing Date"; and
- The court's approval of the asset purchase agreement, which provided that Holdings was not to have "any liabilities in connection with any employment matters, pension plans, profit-sharing plans or other employee benefit plans or severance payments, vacation payments or time due to employees" or any other liabilities or obligations of Post Co. not expressly assumed by Holdings in the agreement.

The first three of those rulings did not address the issue of Holdings' status as a successor to Post Co. They merely insulated Acquisition from liability for performing its duties under the management agreement, and protected Holdings from liability to third parties for claims relating to the assets purchased from Post Co.

The last provision disclaimed liability on Holdings' part for "employment matters," severance payments, and the like, but did not refer to any prospective bargaining obligation or the absence of one. Moreover, the quoted references must be read in context of the rest of the asset purchase agreement. The agreement provided generally that, except for liabilities which it expressly agreed to assume, Holdings "shall not assume any liabilities or obligations of [Post Co.], whether existing or arising prior to or after the Closing Date, related to or arising from: . . ." That general provision was followed by several examples, including those on which the Respondents rely. Clearly, then, Holdings was seeking by those provisions to avoid assuming Post Co.'s liabilities and obligations arising out of, inter alia, employment matters and related issues. There is no indication that the agreement was meant to absolve Holdings of *its own* bargaining obligation arising out of its status as purchaser of the paper, and I do not find that the court, in approving the asset purchase agreement, intended to do so either.

Second, even if the bankruptcy court had specifically ruled that Holdings was not a successor with a bargaining obligation, that ruling would not prevent the Board from reaching the opposite conclusion because the bankruptcy court lacked authority to decide that issue. Obviously, the bankruptcy court could appropriately rule that Holdings would not be a successor in interest to Post Co., in the sense that Holdings would not be liable to Post Co.'s creditors for that company's debts. But successorship for purposes of the Act is an issue of substantive federal labor law over which the Board has primary and exclusive jurisdiction.[38] The bankruptcy court has no more authority to issue such a ruling than it would to adjudicate the unfair labor practice case itself.[39] I therefore would not find that the bankruptcy court's rulings prevented the Board from finding that Holdings had a bargaining obligation.

b. The strike did not violate the terms of the collective-bargaining agreement

The Respondents' argument that the Guild strike violated the collective-bargaining agreement is also wide of the mark.[40] The Respondents are correct, of course, that a strike in violation of a contractual no-strike provision is not protected by Section 7.[41] However, the right to strike is normally protected by the Act, and the Board and the courts will not find that a statutory right has been waived unless the waiver is "clear and unmistakable." In particular, the Supreme Court has held that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.'"[42] In interpreting contract language, the words employed by the parties must be given their "ordinary and reasonable meaning."[43] When the record does not contain extrinsic evidence of the parties' intent, the Board must attempt to determine that intent in light of the ordinary meaning of crucial

[38] *In re Goodman*, 873 F.2d 598, 602–603 (2d Cir. 1989).

[39] Contrary to the Respondents, whether Holdings had a bargaining obligation is not a "collateral issue" of Federal labor law that the bankruptcy court could determine in order to decide some other issue over which it had jurisdiction. Id. at 603. The only issue is whether Holdings could, with the court's approval, contract its way out of its obligations under the Act as a condition to taking over the Post. The bankruptcy court has no more authority to approve such a provision than it would to excuse Holdings from its responsibilities under any other Federal statute.

[40] The Respondents and the Guild disagree as to whether the Guild's contract with Post Co. was still in effect at the time of the strike. I need not and do not address that issue, because I find that the strike did not violate the contract.

[41] See, e.g., *Arlan's Department Store*, 133 NLRB 802, 805 (1961).

[42] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[43] *Silver State Disposal Service*, 326 NLRB 84 (1998), quoting *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3d Cir. 1981).

terms in the contract as applied to the facts.[44] Finally, although an agreement to submit disputes to final, binding arbitration may imply an agreement not to strike over such disputes, a no-strike provision will not be implied beyond the class of disputes that the parties have agreed to resolve through compulsory terminal arbitration.[45]

In support of its claim that this strike was in violation of the collective-bargaining agreement, the Respondents cite the following provisions:

In article XX ("Miscellaneous"):

> Section 7–No Speedups or Slowdowns
>
> There shall be no speedups or slowdowns during the life of this Agreement.

In article XXII (pertaining to duration and renewal of the contract):[46]

> Section 2—Renewal
>
> Negotiations for renewal, modification or extension of this Agreement may be instituted by either party not earlier than 75 days prior to its expiration. In the event such negotiations have not resulted in the renewal, modification or extension of this Agreement prior to its expiration, status quo conditions shall continue thereafter until either party gives the other written notice terminating such conditions.

Although neither of those provisions mentions strikes, the Respondents argue that each in fact prohibits strikes. Their arguments for this position are entirely unpersuasive.

With respect to article XX's prohibition of slowdowns, the Respondents argue that a strike is just the ultimate slowdown, and that the provision therefore prohibits strikes as well. That argument, however, is contrary to the ordinary meanings of "strike" and "slowdown." A strike is not simply an aggravated form of a slowdown: as a general proposition, a strike is protected activity; a slowdown is not.[47] The Guild's agreement to prohibit slowdowns, which are unprotected, thus cannot be deemed a "clear and unmistakable" waiver of its protected right to strike.

The Respondents fare no better with their argument that the "evergreen clause" in article XXII prohibited the Guild from striking without first notifying Acquisition that it was terminating "status quo conditions." The "evergreen clause" fails to mention not only strikes but any sort of work stoppage at all. It merely states that, in the absence of a renewed, modified, or extended agreement, "status quo conditions" shall continue until either party notifies the other in writing that it is terminating those conditions. The ordinary language of that provision does not suggest that the Guild may not use economic pressure to achieve better terms in collective bargaining. The Guild's agreement to the general provision that "status quo conditions" shall be maintained—a provision that does not even refer to strikes—therefore cannot reasonably be found to constitute a "clear and unmistakable" waiver of the right to strike.

Finally, if the parties had wanted to prohibit strikes in either article XX or article XXII, it would have been a simple matter for them to do so explicitly. That they did not is further evidence that they did not intend to include such a prohibition in either portion of the contract.[48] For all the foregoing reasons, then, I find no merit in the Respondents' affirmative defenses, and I would find that they violated Section 8(a)(1), (3), and (5) as alleged in the complaint.

Kevin M. Smith, Esq. and *Yvonne Brown, Esq.,* for the General Counsel.

Betty Southard Murphy, Esq., Elliot S. Azoff, Esq., and *Thomas F. Cooke, II, Esq. (Baker & Hostetler),* of Washington, D.C., and Cleveland, Ohio, for the Respondent.

Irwin Bluestein, Esq. and *Hanan B. Kolko, Esq. (Vladeck, Waldman, Elias & Engelhard, P.C.),* of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 14 days between October 16 and December 14, 1995. The Amended Complaint alleges that Respondent NYP Holdings, Inc. (Holdings), and Respondent NYP Acquisition Corp. (Acquisition), both subsidiaries of News America Publishing Incorporated, (NAPI), are *alter egos,* a single employer and a successor to The New York Post Co., Inc., and that, in violation of Section 8(a) (1), (3), and (5) of the Act, they terminated employees for engaging in a strike, refusing to reinstate them upon an unconditional offer to return to work, and that they withdrew recognition from the Union and made unilateral changes in wages, hours and conditions of employment without prior notice to the Union and without bargaining to impasse with the Union. Respondent Holdings and Respondent Acquisition deny the material allegations of the Complaint and deny that they engaged in any violations of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed

[44] *Mining Specialists*, 314 NLRB 268, 269 (1994).

[45] *Teamsters Local 174 v. Lucas Flour Co*., 369 U.S. 95, 105–106 (1962).

[46] This provision is also referred to as the "evergreen clause."

[47] See, e.g., *Phelps Dodge Copper Products Corp.*, 101 NLRB 360, 368 (1952).

[48] See *Silver State Disposal Service*, supra.

by the General Counsel, the Respondent and the Charging Party on March 29, 1996, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated as follows:

On March 29, 1993, NYP Acquisition Corp. entered into a management agreement, post-petition loan agreement and post-petition security agreement with The New York Post Co., Inc. These agreements were approved by interim order of the Bankruptcy Court in re The New York Post Co., Inc., United Bankruptcy Court, Southern District of New York, Case Number 93 R 41306 (BRL) on March 29th, 1993 and by final order of the court on March 30, 1993.

Between March 20, 1993 and October 1, 1993, Respondent, NYP Acquisition Corp. received monies from The New York Post Co., Inc. accounts in excess of $200,000 which were applied by NYP Acquisition Corp. as partial repayment of loans it was making to The New York Post Co., Inc. all in accordance with the post-petition loan agreement and the post-petition security agreement between The New York Post Co., Inc. and NYP Acquisition Corp.

Between March 29, 1993 and October 1, 1993, The New York Post Co., Inc. derived revenues in excess of $200,000, held membership in and subscribed to various interstate news services, published various nationally syndicated features and advertised various nationally sold products.

Since on or after October 1, 1993, Respondent, NYP Holdings, Inc. annually, in conducting its business operation described in Paragraph 2 (a) of the Complaint, derives gross revenues in excess of $200,000, holds membership in and subscribes to various interstate news services, publishes various nationally syndicated features and advertises various nationally sold products.

The parties agree, and I find, that Newspaper Guild of New York, Local No 3 of the Newspaper Guild, AFL–CIO, (the Guild), is a labor organization within the meaning of Section 2(5) of the Act.

Respondent argues that jurisdiction cannot be asserted over Acquisition because the charge was served only on Holdings but not on Acquisition. Respondent also contends that Acquisition does not meet the criteria for the assertion of jurisidiction over newspaper enterprises. As discussed below, I find that Holdings is an *alter ego* of Acquisition. Therefore, service on Holdings was adequate service on Acquisition. *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270 (1990). Respondent asserts that Acquisition did not receive revenues, was not engaged in interstate commerce, did not subscribe to interstate news services, did not publish nationally syndicated fatures and did not advertise nationally sold products. As set forth in detail below, Acquisition managed and funded the *Post* for The New York Post Co., Inc., a Debtor in Possession.[2] It is clear that Post Co. met the jurisdictional standards established by the Board, but Post Co. had ceased managing the paper and funding its operations. Aquisition received revenues from the operation of the *Post* and applied these revenues to the paper's expenses, and Acquisition funded the paper's losses with sums received from NAPI, the guarantor of Acquisition's management agreement with Post Co. The fact that Acquisition was not in a position to make a profit does not show that Acquisition was not receiving revenue. Further, Acquisition managers notified all the vendors doing business with the *Post* that NAPI guaranteed the financial obligations incurred by the paper during the management period. Thus, Acquisition was responsible for payments to the interstate news services and syndicated features used by the paper and it received the advertising revenue from the nationally sold products featured in the *Post*. I find that Acquisition is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACTS

The transcript of the hearing and the documents admitted into evidence in this proceeding are replete with detailed and fascinating information about the newspaper business, labor relations, politics, two different bankruptcy proceedings and a number of memorable New York characters. In addition, the briefs submitted by the parties recite the facts in great detail. I have not been tempted to set forth at length all the facts contained in the record. My task is to decide the case in as short a decision as is compatible with the obligation to provide a basis for the findings of fact and law. I have therefore omitted to describe many of the events which are not necessary to the decision.

A. Background

The New York Post, a daily tabloid published in New York City and often identified as the oldest newspaper published in the United States since its founding by Alexander Hamilton, had a collective bargaining relationship with the Guild of about 55 years' duration. The Guild represented employees in the editorial, advertising, circulation, publication and business departments. From 1976 through 1988, the *Post* was owned by News America Publishing, Inc., or NAPI, a company controlled by its chairman, K. Rupert Murdoch. Murdoch is the chairman of the News Corporation Ltd., a South Australia company with numerous worldwide subsidiaries, and through a chain of subsidiaries, News Corporation is the ultimate corporate parent of

[1] The Joint Motion of the Parties to Correct the Transcript of Hearing received on May 24, 1996, is hereby granted and is attached as an appendix. [Omitted from publication.] In addition, the following corrections to the transcript are made: at page 84, line 3 should read "will not contest the parties were at impasse"; at line 7 the phrase is "its final proposal"; at page 180, lines 3 and 9, in all cases the word "perspective" should read "prospective"; on page 378, line 9, the correct month is "August"; on page 601, line 7, the correct date is June 6, 1985; on page 664, lines 15-16 should read, "after the number was reached through legerdemain or whatever they call it"; at page 699, line 2 should read "a 1993 letter from Mr. Murdoch"; at page 902, lines 3 and 11, "discreet" should be spelled "discrete"; at page 914, line 2 should begin "Also not taken"; at page 969, line 8, the words "just issuable" should be replaced by "justiciable"; at page 1052, line 16 and thereafter, the author's name is Ken Auletta; on page 1115, the record should show that Mr. Azoff was speaking and not Mr. Bluestein; at page 1239, line 6, the fifth word is "breached".

[2] If Acquisition had been a straightforward debtor in possession, there would have been no doubt of the Board's jurisdiction. *Karsh's Bakery*, 273 NLRB 1131, 1136 (1984).

NAPI. Murdoch exercises *de facto* control of News Corporation and all of its businesses. NAPI owns a New York City based television station, WNYW (Channel 5). In 1988, the FCC cross ownership rules which forbade NAPI from owning both a major newspaper and a television station in the same market resulted in the sale of the *Post* to Peter Kalikow, a person then identified as a New York real estate millionaire. The *Post* had been losing money for some time and, as a condition of its sale to Kalikow, NAPI was required to negotiate agreements with the eleven unions representing *Post* employees to achieve a certain level of savings. After NAPI negotiated these agreements, which for the Guild involved the loss of about 48 unit jobs, Kalikow bought the *Post*.

The New York real estate market declined and the *Post* kept losing money. In 1991, Kalikow filed for personal bankruptcy under Chapter 11. The *Post*, which was owned by Kalikow's company, The New York Post Co., Inc., was not in bankruptcy and it continued to operate with the aid of further concessions agreed to by the various unions. Kalikow funded the operating losses of the *Post* until January 1993, when he threatened to close the paper. At that point, two potential saviors of the *Post* appeared in quick succession, Steven Hoffenberg, the head of Tower Financial, and Abraham Hirschfeld, a parking lot magnate. Suffice it to say that legal, financial and temperamental problems prevented either of these two men from operating and saving the *Post*. Hoffenberg took over management of the *Post* while he arranged to buy it and, when his attempt failed, Hirschfeld tried to run the *Post* beginning in mid-February, 1993. In a few weeks, conditions at the *Post* descended into chaos as employees at all levels of responsibility were fired and those employees who remained became mutinous.[3] The New York Post Co., Inc. filed for bankruptcy on March 15, 1993. Throughout this period, efforts were made by civic leaders to keep the paper alive.

B. NAPI Decides to Pursue the Post

Employees of the various Murdoch companies who had previously been associated with the *Post* began talking about the possibility of reacquiring the paper. Patrick J. Purcell, the president and CEO of NAPI, and a former publisher of the *Post*, testified that the decision to pursue the *Post* was made in early 1993 by him, Murdoch, and David DeVoe, the chief financial officer of the News Corporation Ltd. It was decided that NAPI "wanted a voice in the media capital of the world". Inquiries made by individuals connected with NAPI resulted in a belief that the FCC would probably grant NAPI a waiver of the cross ownership rules that would permit it to own both the *Post* and station WNYW.[4] On March 25, 1993, NYP Acquisition Corp. was incorporated as a subsidiary of NAPI to manage the *Post* pending an eventual purchase of the paper.[5] Acquisition was to provide debtor in possession financing and to explore the feasibility of purchasing the *Post*. Several of Respondent's witnesses testified that another purpose of Acquisition was to acquire the *Post*.

Upon the filing of a petition in bankruptcy, the debtor filing the petition becomes the debtor in possession by operation of law. In the case of the *Pos*t, the debtor in possession was The New York Post Co., Inc., whose stock was owned by Kalikow. Kalikow had been in personal bankruptcy for some time and was no longer financing the paper's losses. The right to manage the *Post* had been held by Hirschfeld pursuant to a management agreement, but Hirschfeld had not exercised proper management and he had not funded the paper's losses.

The *Post*, which was now under supervision of the Bankruptcy Court, was losing about $15 million per year. The paper's physical plant was old and outmoded and had little worth. A newspaper has value only as a continuing enterprise: once it closes, readers and advertisers go elsewhere and there is not much chance of reviving such a paper.[6] The New York City newspaper market is highly competitive and hardly supports the existing publications. Thus, in order to preserve the *Post*, an immediate source of capital and the immediate introduction of effective management was necessary.

After The New York Post Co., Inc., filed for bankruptcy, a Committee of Unsecured Creditors was appointed by the United States Trustee. The Newspaper Guild of New York was one of the 11 members of this committee at its inception. Irwin Bluestein, Esq., Counsel to the Guild, represented the Guild in the bankruptcy proceedings.

On March 26, 1993, Arthur M. Siskind, Esq., the Executive Vice President of NAPI and of Acquisition, and the General Counsel of News Corporation Ltd., wrote to Bankruptcy Judge Francis G. Conrad to confirm proposals made in an earlier telephone conference. Siskind told the Judge:

> a wholly-owned subsidiary of News America is prepared to . . . assume full financial and management responsibility for running the New York Post for an initial interim period of sixty days. During that period, we will provide loans to fund any operating deficit needed to continue publication of the paper in its ordinary course. Because of our prior experience with the paper, we are comfortable in providing this financial undertaking without a dollar limitation. . . .
> During the initial sixty day period we will use our best efforts to secure a required waiver from the Federal Communications Commission to allow the simultaneous ownership of the New York Post and the Channel 5 (WNYW) television station.. . . . Additionally, during this period we will undertake in good faith to make an offer for the New York Post's assets. . . .

On March 28, 1993, Stuart Hirshfield, Esq., wrote to Judge Conrad stating that he represented both NAPI and Acquisition.

[3] For the past few years, employees of the *Post* had endured pay cuts and had lived under the fear of not receiving regular pay checks and of wondering whether payments had been made to fund their benefit and retirement accounts.

[4] NAPI would not sell TV station WNYW because it was a valuable money-making property while even in the best circumstances the *Post* was hardly expected to improve past the break even point.

[5] Acquisition was incorporated with Murdoch as chairman of the board and Purcell as president; other NAPI board members completed the slate of officers of Acquisition.

[6] The exception to this rule is the shutdown of all newspapers in a market which deprives readers and advertisers of the ability to shift to any other local newspaper.

Hirshfield enclosed copies of the documents necessary for Acquisition to take over management of the *Post* which were being submitted for Judge Conrad's approval. Included was an agreement whereby Hirschfeld relinquished his authority to manage the *Post*.[7] The "Recitals" in this agreement state that Acquisition wished to acquire the *Post*. Submitted to Judge Conrad, and sent to all the parties in the bankruptcy proceeding with the formal documents, was a press release which announced that Hirschfeld and Murdoch "have signed an agreement which it is hoped will lead to the transfer of *The New York Post* to a subsidiary of News Corporation." The press release went on to say that "eventual ownership of the paper by News Corporation will be dependent both on the granting of a permanent waiver from the Federal Communications Commission and the outcome of negotiations between unions representing the newspaper's employees, as well as its creditors."

At the subsequent hearings before Judge Conrad, the Creditors' Committee was represented by Howard Seife, Esq.

On March 29, the Bankruptcy Court approved three documents necessary to keep the *Post* functioning until a purchase could be effectuated; these were a management agreement to permit Acquisition to manage the newspaper, a loan agreement whereby Acquisition was to provide debtor in possession financing and a security agreement which gave Acquisition certain priority liens.[8] The management agreement was guaranteed by NAPI. The three documents approved by the Bankruptcy Court insured that Acquisition would provide the funds and management necessary to preserve the paper. The management agreement provided that Acquisition "may" seek Bankruptcy Court approval to purchase assets of The New York Post Co., Inc. The management agreement would expire on June 1 but it could be extended for 30 days by Acquisition if the FCC had not yet granted the waiver. In fact, on June 1, Acquisition extended the management agreement for another 30 days.

It is not necessary to describe the financing arrangements in the bankruptcy proceeding at any length. All the witnesses agree that the *Post* was losing about $300,000 per week and that Acquisition was providing this sum in addition to various sums it provided at the inception of the proceedings. If, against all expectations, the paper had become profitable during the time it was managed by Acquisition, the profit would not have belonged to Acquisition but would have become part of the debtor's estate.

The management agreement approved by the Bankruptcy Court provided that Acquisition had the right to hire and fire employees, but this right was

> subject, in the case of any modification, termination, cancellation, amendment or renegotiation of employee benefit plans or collective bargaining agreements, to prior consultation with the Debtor, and subject to Sec. 1113 of the Bankruptcy Code and, where necessary, to Bankruptcy Court approval.. . . .

Hirshfield testified that Acquisition did not seek to terminate the collective bargaining agreement with the Guild or any of the other unions at the *Post* because Acquisition was not dealing with existing agreements; instead, it was seeking new contracts with the unions.

It was possible, Hirshfield testified, for another purchaser to buy the *Post.* The ultimate agreement to purchase the paper would have to be negotiated with the Creditors Committee and the Debtor prior to being approved by the Bankruptcy Court. Another entity could outbid NAPI by offering a better bargain. In fact, after March 29 a possible purchaser was on the horizon for a while and it received financial information from the Creditors Committee, but this competitor to NAPI did not ultimately make an offer to buy the paper.

On March 29, 1993, Murdoch enjoyed a triumphant return to the *Post* news room, telling the assembled staff, "It's good to be home." Murdoch sent an interoffice memorandum to the employees of the paper thanking them for keeping the *Post* alive and expressing the hope that NAPI would be able to continue publishing the paper.

When Acquisition began to manage the *Post* on March 29, 1993, the paper's employees, including all those in the unit represented by the Guild, continued to work without any change in the terms and conditions established by their respective collective bargaining agreements. The *Post* continued to be published from the same facility and in the same circulation area. The masthead of the paper identified Murdoch as Editor in Chief. Purcell resumed the position of publisher.[9] Ken Chandler, who was then employed by a News Corporation affiliate which produced a television show, was named editor. Robert Peter Faris, who had been editorial manager of the *Post* when it was sold to Kalikow and had continued to work at the paper, was appointed general manager responsible for the day to day operation of the *Post*.[10] There is no dispute that from the moment Acquisition gained the legal right to manage the *Post* it exercised control over the editorial, administrative and financial decisions that kept the paper running. Employees were instructed to fax the most important pages of the paper to Murdoch every day. Numerous people were hired to exercise management control on behalf of Acquisition, changes were made in the content of the paper and in its appearance, and vendors were informed that NAPI was responsible for all liabilities incurred from March 29. There is no evidence that Acquisition made any purchases involving substantial capital investment in the *Post.*

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[7] Everything about Hirschfeld was unusual, including the name of his company, The New New York Post Corporation.

[8] The final order approving the documents was issued on March 30, 1993.

[9] Purcell has worked in various capacities for many News Corporation companies. Murdoch appointed him publisher of the *Post* in January, 1987, a position he held until the sale to Kalikow in 1988. In 1990, Murdoch named him vice president of newspapers for NAPI and in January, 1993, he became president and CEO of NAPI. Purcell left the *Post* in February, 1994; he is now the publisher, president and owner of *The Boston Herald*.

[10] Faris first began to work for the *Post* in 1980. In 1993, he became an executive vice-president of Acquisition and then of Holdings. In February or March, 1994, Faris left the *Post* to become a supervising producer at REPACA, which he identified as a producer of TV shows for the Fox Televisions Stations, Inc., a part of the News America family.

C. Bargaining With the Unions

In order for a subsidiary of NAPI to purchase the *Post*, a waiver of the cross ownership rules had to be obtained from the FCC, the Bankruptcy Court had to approve the purchase and NAPI had to be willing to go through with the purchase. It had been made clear in the early bankruptcy proceedings that NAPI would seek to negotiate changes with the unions. As will be described below, NAPI announced that before it bought the paper it would require concessions from the various unions representing *Post* employees in order to achieve certain savings. NAPI wanted new collective bargaining agreements with each of the eleven unions before it would go through with any purchase.

To prepare for a possible purchase of the paper, Purcell obtained reports from department heads at the *Post* showing changes in operations that would result in savings of about $8 or $9 million. In discussions Purcell held with Faris and the department heads, it was decided that the various unions would be asked to agree to $6.2 million in cost cutting as part of the new collective bargaining agreements to be negotiated before the purchase was made. Purcell assigned the individuals who were to conduct the negotiations: William A. O'Neill, an executive vice president responsible for human resources worldwide in the News Corporation,[11] Faris, the general manager of the *Post*, and two members of Baker & Hostetler, Charles T. Price, Esq. and Victor Strimbu, Esq. Faris had participated in the negotiation of all of the collective bargaining agreements involving the Guild since 1981.

Barry Lipton, the president of the Newspaper Guild of New York, Local 3, testified that after March 29, he attended two private meetings with O'Neill, Strimbu and Price.[12] The first private meeting took place at the end of March or the beginning of April and the second took place before April 6. At each of these meetings, O'Neill said that in order to take over the paper, Murdoch had to have a waiver from the FCC, had to be approved by the Bankruptcy Court and had to have contracts in place with all of the unions. If Murdoch were not successful, the paper would perish. O'Neill said that negotiations would be difficult and, with respect to the Guild unit, he mentioned three areas where change was necessary: severance pay, a 6-month evaluation period for unit employees and a subcontracting provision. If these issues were not resolved, Murdoch would not purchase the *Post*.

On April 6, 1993, O'Neill addressed a meeting attended by officials of the unions representing *Post* employees.[13] He told the unions that there were three hurdles to the ultimate purchase of the *Post* and that one hurdle was change and sacrifice needed to keep the paper alive. O'Neill said that he did not intend to renew the existing collective bargaining agreements but that he wanted new contracts. O'Neill stressed that the negotiations that were about to take place with the *Post* unions would not be normal negotiations. The NAPI negotiators were not representing an employer and they could walk away at any time. The NAPI negotiators would determine whether new contracts could be arrived at that would enable the prospective purchaser to buy the assets and operate the *Post.* If the negotiations failed, the purchase would not go through. A precondition to the purchase was agreement with all the unions. The themes sounded by O'Neill on April 6 were regularly repeated throughout the negotiations that ensued, and the NAPI negotiators often told the Guild that they did not represent the employer, they represented a prospective purchaser and they could walk away at any time.

Faris testified that in the negotiations for a new contract with the Guild he was bargaining on behalf of a prospective new owner. The management negotiators did not yet know what form the new owner would take; it might be Acquisition or NAPI or a new company. The proposed contract given to the Guild on May 27, 1993, defined the "Publisher" as New York Post Acquisition Co., although this is not the correct name of Acquisition. Whatever the term used in negotiations, whether it was "News Corp.", or "NAPI", or "Acquisition", or "Murdoch", or "the new owner", the record is clear that the Guild negotiators knew that the management negotiators were bargaining on behalf of a prospective purchaser of the *Post*. It was clear that NAPI was eager to buy the paper and that it was funding losses to the tune of $300,000 per week, but it was also clear that unless significant labor concessions were reached and were embodied in a new collective bargaining agreement, then NAPI would not go through with the purchase. Lipton testified that the "new owner" wanted a completely rewritten contract. Although the Union would have been happy to have the old agreement remain in effect, Lipton knew that the prospective purchaser wanted a new collective bargaining agreement. Lipton testified that he never negotiated with Acquisition to modify the agreement that covered Guild employees during the Acquisition management period.

The first formal bargaining session with the Guild took place on May 27, 1993. The proposed new contract presented to the Guild at this meeting differed in many respects from the old contract. For four months thereafter, Lipton and his negotiating committee met with Faris, Price, Strimbu, and occasionally O'Neill, in an attempt to reach agreement. As will be seen below, the issues mentioned by O'Neill to Lipton during their private meetings ultimately proved decisive in the negotiations by preventing the parties from reaching agreement on a new contract.

The NAPI negotiators wanted to gain the right to subcontract Guild work. The Union was willing to discuss subcontracting and it sought job security protections for those unit members who might be affected by the changes. This subject was not as difficult as the other two major proposals advanced by the management negotiators.

The NAPI negotiators initially asked for a 6-month probationary period during which all unit employees would be evaluated by management and during which those employees found unsuitable could be discharged without recourse to grievance

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[11] O'Neill is an executive vice president of Acquisition, NAPI and the News Corporation Ltd. He is employed by the News Corporation and is paid by NAPI.

[12] Lipton has been president of the Union since 1985; before that he was secretary-treasurer.

[13] In his testimony concerning the prospective purchase, O'Neill used interchangeably the terms "we", "News Corporation", "NAPI" and "Acquisition."

procedures and without dismissal pay. The management negotiators told the Guild that the editorial and advertising departments were critical to the paper because they were the only revenue-generating departments. For the paper to be successful, more revenue had to be produced and the prospective purchaser needed employees with the skills to make the paper viable. Price and Strimbu told the Union that if the sale went through and the *Post* grew, the Guild would profit in that its unit would expand.[14] The prospective purchaser wanted to be able to choose people who would reflect its editorial views and it wanted to build an aggressive advertising staff. The Guild replied with a proposal for a three month trial period with arbitration of dismissals, a severance pay component and a proposal that anyone terminated would be replaced. In the course of the negotiations, NAPI agreed to shorten the evaluation period, but it was resolute in resisting all Union proposals for some sort of third party review. The most it would offer in the way of review was a proposal that dismissals during the trial period could be appealed to the publisher. The Guild was equally resolute in disagreeing with what it called a "free fire zone", and Lipton told the NAPI negotiators that his members would not work under a system whereby they could be discharged without the right of appeal to a third party. As the negotiations proceeded, various proposals were exchanged on this subject but none of these proved to be the basis for an agreement.

The new contract proposed by NAPI did not contain severance provisions similar to those in the traditional Guild contracts of the past. NAPI was offering compensation of one week's pay for each year of service to any employee who was dismissed or discharged, with a cap of eight weeks' pay based on service accumulated under the new employer. The old contracts had provided for a generous accumulation of severance pay which was viewed by long service employees as a major part of their financial security in retirement: employees who were dismissed or discharged could receive up to 50 weeks severance pay, and those employees who had reached age 50 with 20 years of employment, could resign and receive full severance pay. Some employees were entitled to almost one year's pay under the old contract. Although employees had claims pending in the Kalikow and New York Post Co. bankruptcy cases for their accumulated severance pay, they could not realistically expect to collect more than a tiny fraction of what they claimed. Thus, the Guild was insistent that a new owner of the *Post* carry forward the accumulated severance pay entitlement of the unit employees. The accumulated severance entitlement was calculated as a sum in excess of $7 million, an obligation the prospective purchaser was not willing to assume in view of the goal to achieve $6.2 million savings in the new contracts with all eleven unions.

Negotiations continued, but extensive discussions of the proposals made by each side did not lead to an agreement. The Union would not agree to any contract that did not carry forward the severance obligation and that did not provide for third party review of dismissals from the Guild unit. The NAPI negotiators would not agree to any contract that imposed severance obligations accumulated under a previous employer and that imposed a review of dismissals during the initial evaluation to be conducted by the new employer.

On June 11, the Guild was authorized by unit members to conduct a strike, although no strike deadline was set.

On June 29, the FCC granted the waiver of the cross-ownership rules so that both the *Post* and station WNYW could be owned by News Corporation Ltd.

On June 30, the Bankruptcy Court issued an Order extending the management agreement between the *Post* and Acquisition for 60 days. The Order stated that:

> News America believes that ... The Post will not be economically viable unless its labor costs are significantly reduced

The Order went on to recite that the 60 day extension was sought for various purposes: for the purpose of negotiating with the various labor unions so that the operation of the paper becomes "in the determination of News America, economically viable"; for the purpose of negotiating with the parties in the bankruptcy case for a purchase of the assets of the *Post* "if such labor negotiations are concluded on terms acceptable to News America"; for the purpose of tendering an offer to acquire the assets; and for the purpose of seeking approval of the court if the offer was accepted. The Order extended the management and financing agreements until August 30, 1993, but it gave Acquisition the right to terminate the management agreement if any of the purposes recited above were not met. Acquisition was obliged to give notice of three days if it wished to terminate the management agreement.[15]

On June 30, Purcell set a deadline of July 9, 1993, for reaching agreement on new contracts with all eleven *Post* unions. NAPI wanted the new contracts by that date so that it would know whether it could go forward with a purchase of the paper's assets. On July 6, when it seemed that the deadline would not be met, Siskind gave notice to the parties in the *Post* bankruptcy on behalf of NAPI and Acquisition that the management agreement would terminate on the afternoon of July 9. Siskind's letter reserved "the right to cancel this notice in the event that collective bargaining agreements acceptable to News America and Acquisition are reached with the unions on or before" the afternoon of July 9. On July 9, Purcell decided that there was insufficient progress in negotiations with the unions and he made the decision to close the *Post*. The NAPI negotiating team dispersed, and the *Post* was not published for two days. However, following the intervention of Governor Cuomo of New York, the negotiations resumed and agreements in principle were reached with ten unions but not with the Guild. These agreements gave NAPI the $6.2 million savings it had sought.[16] On July 12, by stipulation of the parties in the bankruptcy case, the management agreement was reinstated be-

[14] The proposal for dismissals during a probationary period was not meant to shrink the Guild unit; rather, the NAPI negotiators told the Union that the new owner intended to replace those dismissed with new employees.

[15] The Bankruptcy Court Order recited the fact that the FCC waiver had been granted.

[16] Under these ten agreements, a number of employees would lose their jobs upon the effective date of the contracts.

cause, as stated in the Order of the Bankruptcy Court, "In the judgment of News America, sufficient progress has now been made in negotiations with certain labor unions to permit reinstatement of the Management Agreement." The *Post* began to publish once more, but there was still no agreement with the Guild.

Once the FCC waiver had been secured and agreement in principle had been arrived at with most of the *Post* unions, the purchase of the paper seemed possible to the NAPI representatives. As the manager of the paper in the bankruptcy case, Acquisition was under a duty to make certain financial reports to the other parties. NAPI decided that the purchase should be carried out by a new company with independent records that would not be accessible to the Creditors Committee and the Debtor, and with independent relationships with vendors, employees and the unions. On July 12, 1993, NYP Holdings, Inc., was incorporated as a subsidiary of NAPI to carry out the eventual purchase of the *Post*. The slate of board members and officers of Holdings when it was incorporated was practically identical to the board members and officers of Acquisition; Murdoch was listed as chairman of the board.[17]

Throughout July, August and September, the Guild and NAPI negotiators tried to resolve the issues standing in the way of a collective bargaining agreement. After July 9, there were approximately 15 bargaining sessions during which the parties discussed severance, subcontracting and the evaluation or probationary period. Various concepts and proposals were exchanged, but no agreement was reached. The Union would not depart from its demand that dismissals during the evaluation period should be subject to some sort of third party review and the prospective owner insisted that it should have the unfettered right to staff the paper with employees possessing the skills it believed were necessary. Both sides discussed the fairness of the evaluation and dismissal process, and the NAPI negotiators presented an evaluation proposal that did not include outside review. The Union asked how many unit members would be dismissed during the evaluation period, but the NAPI negotiators said they would not know that until the purchase of the *Post's* assets had been accomplished. The Guild representatives stated throughout the negotiations that Guild members would not work under the probationary concept demanded by the prospective purchaser. The Union wanted the prospective purchaser to fund the employees' severance rights. Although the NAPI negotiators eventually offered a pot of $1.5 million for those dismissed during the probationary period in lieu of assuming the $7 million accumulated severance obligation of all the unit employees, this offer was not acceptable to the Union.

At the negotiation session held on September 7, the Guild announced that if the major items in contention were not resolved that week, its members would strike.[18] However, negotiations continued and no strike took place. On September 15, the NAPI negotiators gave the Union a proposal on the subcontracting issue, but this was not acceptable to the Guild and it was rejected. There was a further discussion of the evaluation and severance issues, but no agreement was reached. Aside from some private meetings which were not successful in breaking the deadlock between the parties, no collective bargaining negotiations were conducted between September 15 and September 27. On that last day, the negotiators did not change their positions and they did not reach agreement.

D. Approval of Asset Purchase

While the negotiations with the Guild were proceeding, a motion was filed in the Post Co. bankruptcy case on August 6, 1993, seeking approval of the Asset Purchase Agreement between Post Co. and Holdings. The Guild filed an objection to the proposed sale. In his September 8 affidavit supporting the Guild's objection to the sale, Lipton stated that the sale price was insufficient to pay the claims of unit members. Lipton averred:

> These claims . . . include . . . approximately 6.9 million dollars for severance pay to Guild-represented employees whose employment with the Debtor will be terminated by the Debtor upon the closing of the Asset Purchase Agreement and who, whether or not they become employees of NYP Holdings will be entitled to severance when terminated by the Debtor at the closing of the transaction.

The purchase price, calculated at about $23 million, included cash and the assumption of certain liabilities, plus an amount equal to the advances made by Acquisition, plus liabilities to be assumed and paid in connection with certain assumed executory contracts and leases.[19] At the closing, Holdings was to pay The New York Post Co., Inc., about $2.7 million and Holdings was to pay Acquisition over $10 million in repayment of loans made by Acquisition to Post Co. pursuant to the loan agreement of March 29, 1993. The motion requesting approval of the asset purchase agreement informed the Bankruptcy Court that as part of Holdings' acquisition of the assets:

> News America has negotiated and reached new agreements in principle with ten of the eleven labor unions which represent the Newspaper's employees. . . . These agreements in principle are not scheduled to take effect until after the Closing Date and are between News America and the Unions. The Post is not a party to these agreements in principle, and the Unions would not be bound to these agreements if a third party acquired the Post.

While approval of the asset purchase agreement was pending, the Bankruptcy Court issued an order extending Acquisition's management agreement and the financing agreements until October 1.

The Bankruptcy Court held a hearing on September 14, to consider approval of the asset purchase agreement between Holdings and The New York Post Co., Inc. At the hearing, Hirshfield informed the Judge that Holdings had negotiated new collective-bargaining agreements with all but one of the unions. These agreements were subject to ratification by the

[17] Acquisition was eliminated in March, 1994, after Holdings bought the paper.

[18] At this time, the NAPI negotiators were working on the final language of the written agreements with the ten other unions.

[19] The liabilities specifically assumed did not include the severance pay liability under the old contract covering the paper's employees.

respective memberships of the units involved, and they would become effective upon closing of the asset purchase. He stated, "There is no present agreement with the Newspaper Guild nor is NYP Holdings or the Post assuming anything with respect to their contract." Hirshfield said that although the asset purchase agreement required new union contracts to be in force as a condition of closing the purchase of assets, Holdings would nevertheless close the deal even if it had not arrived at an agreement with the Guild. Further, he stated that Faris, if called to testify, would state that failure to reach agreement with the Guild would not affect the sale; "[W]e would close without that."[20] The asset purchase agreement provided that Holdings could terminate the purchase agreement if it had not entered into collective-bargaining agreements with such of the unions as it selected, on terms and conditions acceptable to it in its sole discretion.

The Bankruptcy Court issued an Order dated September 14, approving the sale of assets of The New York Post Co., Inc., to NYP Holdings, Inc., free and clear of all liens, claims and encumbrances. The Order included a provision that:

> Except as provided in the asset purchase agreement, from and after the closing date, NYP [Holdings] shall not be deemed to be or liable as a successor in interest to the debtor for any claims, liabilities, damages or causes of action with regard to the purchased assets which arise from or relate to the period prior to the closing date.

Although it had filed an objection, the Guild did not appeal the Bankruptcy Court's Order approving the sale.[21]

Both Lipton and O'Neill were present at the Bankruptcy Court hearing when the asset purchase agreement was approved on September 14. Lipton testified that he spoke to O'Neill briefly and asked him what the position would be if no agreement with the Guild had been reached by the time the sale closed. According to Lipton, O'Neill replied that they would either continue to recognize the collective-bargaining agreement or they would post conditions. According to Lipton, O'Neill went on to say that the proposed probationary period would not be harmful; it would only affect a small number of employees. O'Neill denied Lipton's version of their conversation in the Bankruptcy Court. He recalled that Lipton apologized for some harsh words the Union negotiators had used at a recent meeting and that Lipton said, "This is going to be terrible, we must have a contract." O'Neill testified that he replied that NAPI wanted no more than the publisher had at the competitor *Daily News*. Lipton responded that he knew what O'Neill wanted and that he would get there in his own way. O'Neill denied telling Lipton that if there were no new contract when the sale closed they would continue to work under the same terms or post conditions.

[20] Respondent offered no testimony to explain why, on September 14, the NAPI position was that a closing could take place if the other unions ratified their contracts even if no agreement was reached with the Guild. From the outset of negotiations with the eleven unions, NAPI negotiators had maintained that agreement with all of the unions was a precondition to a purchase of the paper.

[21] The actual closing took place on October 1, 1993.

Lipton stated that at one of the last bargaining sessions in September, either Faris or Price said that they had not decided what would happen if no agreement were reached; they might go for it under the existing terms or they would post conditions if impasse occurred. Price, who attended all of the September bargaining sessions, testified that neither he nor Faris ever said that if no contract were reached they would go for it under the existing terms or post conditions if an impasse occurred. Price denied that there was ever any discussion of what might be done if no agreement were reached with the Guild. Faris was not asked whether the NAPI bargainers made any reference to what would happen if no agreement were reached with the Guild.

E. The Strike and Its Aftermath

The Guild announced a strike deadline of 4pm for September 27, 1993.[22]

On September 24, Faris issued an interoffice memorandum to *Post* employees in the Guild unit informing them of their rights to strike or not to strike, and to resign and cross the picket line in case of a strike. The memorandum expressed the hope that employees would continue to report to work during any strike. At the same time, Faris addressed a memorandum to all the other *Post* employees, telling them that they were expected to work during any strike by the Guild.

Before 4 p.m., on September 27, the Guild negotiators met with Price and Faris to talk about the issues, but neither side would change its position. During the discussions, Faris asked Lipton whom the Guild was striking and Lipton responded that the Guild was striking the *Post.* Price testified that he told Guild negotiators that Holdings would not purchase the *Post* if they struck and the paper was not published.

After they left the meeting with the Guild, Price and Faris went into Purcell's office where they were joined by O'Neill and Strimbu and officers of the Allied Printing Trades Council, the umbrella organization of newspaper unions. Price and Faris reported that no agreement had been reached and that the Guild was prepared to strike at 4pm. The officers of the Allied expressed their concern and stated that they wanted the asset purchase to be completed by Holdings in order to preserve jobs for their unit members. After briefly leaving Purcell's office to speak to the Guild committee, the Allied officers returned with Lipton and other Guild negotiators. The major issues were discussed again and the NAPI negotiators stated that they would not agree to third party determination and to an assumption of the severance obligation. According to Purcell, when he reiterated his position against third party review of dismissals during the evaluation period, Lipton replied that under no circumstances would his members work for the paper under those conditions. Purcell thought that this statement was a declaration of impasse. Strimbu recalled that Lipton told those present at the meeting in Purcell's office that the Guild would never agree to the three conditions demanded by the NAPI negotiators. Lipton said the membership would not approve it. Lipton recalled this meeting in his testimony; he told Purcell that if they could reach agreement in principle on the issue of third

[22] The record is not clear when this deadline was set.

party review, the Guild employees would work while negotiations went forward. According to Lipton, Purcell responded by turning to the other union leaders present and telling them that the paper would be closed unless they went to work.

Lipton testified that no NAPI representative ever asserted to him that a strike violated the law or any collective bargaining agreement. Lipton testified that the Guild strike was not motivated by breaches of the agreement between The New York Post Co., Inc. and the Guild; rather, the strike was called to put pressure on Holdings to agree to contract demands which the Guild was seeking for the prospective collective bargaining agreement.[23] Lipton stated that the Guild struck because it did not receive a "positive response" to the severance and probationary issues.

At 4 p.m. on September 27, 1993, the Guild put up its picket line around the building where the paper was published. The picket signs proclaimed a strike against the *Post.* Lipton testified that the Guild employees were striking in order to prevent publication of the paper by convincing the other unions not to cross the picket line. The unions who belonged to the Allied Printing Trades Council had voted not to support the Guild's strike.[24] However, on September 27, the members of the Allied refused to cross the Guild picket line and the September 28 edition of the paper was not published. Purcell testified that he decided that night to shut the paper down and he advised Murdoch of his decision. The next day, he and Murdoch agreed that they had no choice but to close down.

Strimbu testified that on September 28, McDonald of the Allied telephoned him and said he wanted to do something to preserve the jobs of the paper's employees. He told Strimbu that the Allied employees would cross the picket line and come to work. Strimbu told McDonald to call O'Neill and Purcell.

On September 28, Faris wrote to Lipton on behalf of Acquisition stating:

> The strike by the Newspaper Guild of New York ... against *The New York Post* has terminated any and all terms and conditions of employment of employees of the New York Post Co., Inc. represented by the Guild provided for in any agreement of any kind or nature between The New York Post Co., Inc. and the Guild. Since the Guild struck without formally terminating such terms and conditions as provided for in the expired collective bargaining agreement, the Company is confirming that such terms and conditions have been terminated.

Lipton replied the same day, writing:

> I have your letter of September 28, 1993 purporting to confirm the termination of the collective bargaining agreement governing the terms and conditions of employment of the employees in the Guild's bargaining unit at The New York Post.
>
> The Guild does not agree that the September 27, 1993 strike has that effect.

Faris responded to Lipton's letter on the same day:

> . . . clearly your strike altered the status quo conditions and ended the Agreement between New York Post Co., Inc. and Newspaper Guild of New York.
>
> Lest there be any doubt as to whether the Agreement somehow survives your strike, please be advised that NYP Acquisition Corp., in its capacity as manager of the *New York Post,* hereby gives Newspaper Guild of New York notice of termination of the collective bargaining Agreement between New York Post Co., Inc. and Newspaper Guild of New York and all the terms and conditions attendant thereto, effective immediately.

The exchange ended on September 30, 1993, with Lipton's letter in response to Faris, maintaining that:

> The Guild does not agree that you have the right to take the action you have purported to take, and it reserves all of its rights.

Lipton testified that he made two telephone calls to Purcell in which he requested that bargaining continue. On the second evening of the strike, he asked Purcell if they could resume bargaining and come to an agreement which would end the strike and get the Guild members back into the building. Purcell said it was too late because Murdoch had already decided to close the *Post*. The next day, Lipton testified, he was on his way to an Allied meeting when he again telephoned Purcell to request a resumption of the negotiations, but Purcell said it was too late, Murdoch had closed the paper. Lipton's testimony concerning the timing of these calls was subject to an understandable confusion in that he was awake and conducting business without any rest during this period. Lipton testified that the first call was made in the middle of the night and thus it was probably placed late on the 28th or very early on the 29th. The second call was made many hours later. As described below, Lipton attended a meeting of the Allied where the other unions tried to convince him to return Guild members to work. This meeting would have taken place before another meeting, described below, between the Allied and Murdoch and his negotiators during the night of September 29. Purcell did not testify about Lipton's two requests to bargain, and Lipton's testimony is thus unrebutted.

The *Post* was not published on September 29, and on that day Governor Cuomo intervened once more to try to save the paper.

Lipton testified that on September 29, the leaders of the Allied invited him to attend a meeting. The Allied officials told Lipton that Purcell had already taken steps to close the paper. The Allied officials requested that Guild members report to work that evening, and they said that they would try to convince Purcell to resume publication if the Guild agreed to return. Lipton told the Allied officials that he needed an agreement in principle that there would be negotiation concerning third party review, but that if there were no such agreement his members would not return to work. Lipton testified that he could not agree to the NAPI proposal for a probationary period

[23] Lipton's affidavit of January, 1994, in the Kalikow bankruptcy case states that he negotiated with Holdings for a collective bargaining agreement to take effect when the paper was sold and that the Union struck to put pressure on Holdings to agree to Guild demands.

[24] The Guild had terminated its membership in the Allied in early 1993. Lipton testified that the head of the Allied, George McDonald, is not viewed as a friend of the Guild.

because it was a "fire at will" situation with no job security. Lipton reiterated that he had often told the negotiators for the new owner that he would not agree to any contract without third party review of dismissals during the evaluation period; he explained to the management negotiators that there was an absolute certainty that his members would not work without recourse to third party determination.

Purcell testified that he received a telephone call from McDonald, the head of the Allied, saying that he would try to convince the members of the production unions to come back to work and asking Purcell whether he would reopen the paper on that basis.[25] Purcell agreed to ask Murdoch about this idea. After consulting with Murdoch, Purcell informed McDonald that if all the other unions returned to work, Holdings would go forward with its purchase of the *Post* and Holdings would exercise its right as a new employer to hire a new white collar work force. Strimbu described a meeting held at night on September 29 at the News Corporation building on 6th Avenue in New York City which he attended with Murdoch, Purcell, O'Neill and Price and officials of the craft unions and the drivers' union. At this meeting, the ten unions gave their pledge that if Holdings would go forward with its plan to acquire the *Post*, their members would cross the picket line. Strimbu stated that Purcell had decided to hire a new workforce in the former Guild areas. He would start up the publication of the paper with exempt personnel and immediately being the hiring process for new employees.

At 8 p.m. on September 30, the ten unions crossed the Guild picket line and publication of the *Post* resumed. On October 1, Holdings purchased the assets of The New York Post Co., Inc., pursuant to the asset purchase agreement approved by the Bankruptcy Court. Also, on October 1, Holdings signed new collective bargaining agreements with the ten unions; their members did not have to apply for employment with Holdings.

On September 30, Faris wrote to Lipton on behalf of Holdings, informing him that:

> N.Y.P. Holdings, Inc. (the "Company") is seeking to purchase certain assets of the New York Post., Inc. If the Company purchases such assets and if such purchase is approved by the United States Bankruptcy court ... the Company will not assume and will not be bound by any agreement of any kind or nature, whether written, oral, expressed or implied between any predecessor publisher and/or owner of the *New York Post* newspaper ... including without limitation any collective bargaining agreements, letters of interpretation, verbal understandings, past practice or arbitration awards.
>
> If such purchase is completed . . . the Company, as a new employer, will be hiring persons and will establish the initial terms and conditions of employment for those persons, including for those persons it may hire who were represented by the Guild under predecessor owners of *The New York Post*. . . .

On October 2, Lipton testified, he telephoned O'Neill and told him the Guild members would probably vote to end the strike and would make an unconditional offer to return to work. O'Neill said it was too late; the paper would be hiring a new staff and it had no obligation to accept the Guild members who were free to apply for employment with everybody else. Later that day, Lipton spoke to Faris and informed him that the Guild had voted to cease picketing. Faris said that the Guild members could apply for work with everybody else.

The Guild picket line was taken down on October 4. On that day, Lipton wrote to Faris and told him that the Guild had ceased all strike and picketing activities at noon. Lipton's letter stated, "On behalf of the employees in the Guild's bargaining unit at The Post, the Guild hereby makes an offer to return to work."

Faris replied to Lipton by letter of October 5. He said:

> . . . N.Y.P. Holdings, Inc., as a new employer, is in the process of accepting applications and hiring employees to work in a number of positions at the newspaper. N.Y.P. Holdings, Inc. has received applications from New York Post Co., Inc. employees as well as from other applicants and will be processing all applications over the next few months.
>
> Since persons you represent are New York Post Co., Inc. employees, you should direct questions concerning your offer and the status of your members to that company.

As stated in Faris' letter, Holdings required Guild members to fill out employment applications. The record is not clear how many employees were in the unit represented by the Guild. The Guild's publications stated that there were 287 unit members. Respondent's brief states that there were over 200 Guild employees. General Counsel submitted an exhibit which lists 278 employees, but General Counsel's brief states that there were 192 employees. Of the Guild employees of the *Post* on September 27, 1993, Price estimated that 70 to 75 were employed by Holdings.[26] As of the time of the instant hearing, from 235 to 240 employees were in positions formerly represented by the Guild. There is no dispute that the terms and conditions under which these employees were hired differ from those in effect before October 1, 1993, and differ from those in any contract offer made by the NAPI negotiators to the Guild during the course of their negotiations. Respondent does not contend that it implemented its final offer after the strike.

An October 5, 1993, *Bulletin* published by Local 3 and entitled "Update on situation at the Post", attacked Murdoch for using the federal bankruptcy laws to steal the jobs of 287 Guild employees at the *Post.* The document criticized the Allied for encouraging its members to cross the picket line which resulted in a situation where Guild members had to reapply for their jobs. The Bulletin quotes Lipton as stating "that the . . . . situation was brought about by federal bankruptcy laws. . . . Because Murdoch's purchase of the paper was the result of an

[25] Purcell did not testify what date he received this telephone call.

[26] Price testified that the actual number of hires was higher because some people were hired directly to management positions and some were hired but then quit. As many as 90 former Post Co. Guild employees may have been hired by Holdings.

'asset sale,' he could ignore the Guild contract and get away with terminating the strikers."

On October 1, 1993, Marilyn Simon, Esq., bankruptcy counsel to the debtor in The New York Post Co., Inc. bankruptcy case, wrote to Bluestein in his capacity as counsel to the Guild. Simon wrote that the asset purchase agreement between the Debtor and Holdings had closed and that as a result of the closing:

> . . . all of the Purchased Assets . . . have been transferred to NYP [Holdings} and the Debtor has ceased operations as an ongoing entity. . . . Accordingly, you are hereby notified that the Debtor no longer requires the services of the Guild employees. . . .

On October 7, Randy M. Mastro, Esq., counsel to Peter Kalikow, sent a letter to Bluestein by fax, informing him that Simon's letter was unauthorized by his client.[27] Mastro's letter contended that Simon's letter was inaccurate. Mastro stated that the Guild struck the New York Post Co. before the sale and the strike continued after the sale. The letter concluded:

> . . . To the extent that any Guild members do not have employment with the Post as of today, they have only themselves and the Post's new owner to blame. My client had nothing to do with that circumstance and, indeed, even prior to the sale, had turned over management control of the Post to the eventual new owner.

Mastro had previously informed the Bankruptcy Court at a June 30 hearing that his "client's concern obviously is in seeing that the Kalikow estate not have liabilities when the *Post* is sold."

On October 27, 1993, Lipton wrote to Faris as follows:

> As you were informed on October 4, 1993, the Guild ended its strike against the Post and, on behalf of all Guild-represented striking employees, offered to immediately return to work. To date, the vast majority of employees formerly on strike have not been returned to work. Please advise me as to when these employees may expect to return to work
>
> The Guild is still committed to negotiating and reaching a collective bargaining agreement with the Post. To that end, the Guild is willing to meet and negotiate at any time, and for as long as needed, so that we can reach an agreement. Please advise me as to dates on which the Post is available to bargain.

On November 3, Faris responded by referring Lipton to his October 5 letter and suggesting that Lipton write to The New York Post Co., Inc. which had changed its name to Kopa, Inc.

The Guild filed its first charge herein on November 1 and it was served on Holdings on November 12, 1993.

F. Relevant Collective-Bargaining Agreements

1. The last complete collective bargaining contract between the Post and the Guild had a term from March 31, 1981 to March 31, 1984, and was negotiated by a News America company.

[27] Mastro did not represent The New York Post Co., Inc.

Article X—Severance Pay, provided, in substance, for up to 50 weeks severance pay for long service employees and provided that employees could collect full severance pay upon reaching age 50 or completing 20 years' service.

Article XIII—Job Security, provided that discharge must be upon just and sufficient cause and that economy dismissals must be by reverse seniority. All dismissals were subject to ultimate decision by an arbitrator.

The grievance procedure in Article XIX provided, inter alia,

> Section 5 - Renewal of Agreement
>
> The renewal of this Agreement shall not be considered a dispute under the provisions of this Article and shall not be subject to Arbitration.
>
> Section 6 - Pending Arbitration
>
> There shall be no suspension of work over an issue which is in dispute and is in process of arbitration.

Article XX - Miscellaneous provided, inter alia,

> Section 7 - No Speedups or Slowdown
>
> There shall be no speedups or slowdowns during the life of this Agreement.

Article XXII provided for duration and renewal

> Section 1 - Duration
>
> This Agreement . . . shall inure to the benefit of and be binding upon the successors and assigns of the parties, it being understood, however, that transfer, sale or assignment of the ownership or control of the paper shall not be construed nor considered as a break in the continuity of employment of the employees. . . .
>
> Section 2 - Renewal

Negotiations for renewal, modification or extension of this Agreement may be instituted by either party not earlier than 75 days prior to its expiration. In the event such negotiations have not resulted in the renewal, modification or extension of this Agreement prior to its expiration, status quo conditions shall continue thereafter until either party gives the other written notice terminating such conditions.

2. The 1981–1984 contract was extended several times with modifications not relevant herein. A memorandum of agreement dated January 7, 1988 was negotiated by News America and signed by Purcell. It was effective from March 31, 1987 through March 30, 1988. This memorandum substituted new language for the successors and assignees language of Article XXII, Section 1:

> The collective bargaining agreement shall be binding upon the Publisher and its successors and assignees.
>
> It is acknowledged that the terms "successors" and "assignees are intended to mean any entity to which all or substantially all the newspaper operations or related assets of the New York Post are sold, merged or otherwise transferred regardless of the form of the transfer, provided that the purchaser or transferee continues to produce daily and/or Sunday newspapers for distribution within the territorial jurisdiction of the union.

> This agreement shall survive the expiration of the collective bargaining agreement.

3. On March 8, 1988, a memorandum of agreement negotiated by NAPI and the Guild and signed by NAPI, the Guild and a representative of Kalikow provided the cost and staff reductions necessary for NAPI to sell the paper to Kalikow. This memorandum provided :

> 1. The current collective bargaining agreement between News America and the Guild and all obligations thereunder shall be assumed by Kalikow on the closing date of sale by News America of the assets of the Post to Kalikow and shall be extended to and including March 6, 1991 with only the changes and modifications hereinafter set forth.
>
> 2. On and after the closing date, the publisher of the Post and the employer of all Post employees shall be Kalikow. . . .

4. Following further modifications of the agreement, Kalikow and the Guild agreed to a further extension on May 4, 1992. This short memorandum provided that the current contract would remain in effect until a new contract was ratified, that any increases granted in the new contract would be retroactive to March 6, 1991, and that

> In the event ownership, in whole or in part, of the Post is transferred during the term hereof, whether by sale of stock, assets, merger, lease consolidation or any other form of transfer of title or interest, or if the Post enters into, or any corporate parent of (sic) affiliate causes it to enter into, a joint operating agreement or any other kind of combination or merger with another newspaper, then this Memorandum of Agreement shall thereupon be null and void.

Lipton testified that from May to September, 1993, Faris and Price took the position that there was no collective bargaining agreement in effect at the time. However, Lipton stated that in mid-July, he reached an agreement with O'Neill that Acquisition would reaffirm in writing that the parties were operating under the terms and conditions of the collective bargaining agreement. At a July 28 bargaining session, Faris told Lipton that he recalled this conversation but he would have to check whether they had agreed to put it in writing. Faris later told Lipton he had not checked the position and the agreement was never put into writing.

O'Neill testified that at a July 9 bargaining session, Lipton asked him what terms and conditions would prevail from that point on. O'Neill replied that the existing terms and conditions would continue until a new contract was negotiated. When Lipton asked him to put that in writing, O'Neill refused saying that it was a matter of fact and did not have to be substantiated. He recalled that Lipton repeatedly asked that he put in writing his statement that the terms and conditions during the Acquisition management period would be those of the old contract, but that he saw no point to this exercise because of the evergreen clause in the old contract.

G. Discussion and Conclusions

The General Counsel's argument is clear. General Counsel maintains that even though Acquisition did not own the *Post,* it was nevertheless a "legal successor" to The New York Post Co., Inc., with an obligation to recognize and bargain with the Guild on behalf of the unit employees as of March 29, 1993. General Counsel asserts that Acquisition refused to bargain with the Guild on September 28 and 29. General Counsel further asserts that Holdings is an *alter ego* of Acquisition with an obligation to recognize and bargain with the Guild; when Holdings refused to bargain with the Guild, withdrew recognition after it had purchased the assets of the paper and established new terms and conditions of employment, Holdings violated the Act. General Counsel argues that Holdings discharged Guild employees because they struck and that Holdings refused to reinstate them pursuant to their unconditional offer to return to work and that these actions constitute further violations of the Act.

Respondent denies that Acquisition was a successor to The New York Post Co., Inc., maintaining that it was no more than a manager until the Bankruptcy Court approved a sale of assets to Holdings. Respondent asserts that Holdings was the purchaser and therefore the successor to Post Co., and that the Guild unit employees of the *Post* were always aware that the purchaser would not retain them without a change in terms and conditions of employment. Respondent states that the Guild strike was unlawful under the status quo provisions of the old contract applicable to Post Co. employees. Respondent argues that the policies underlying the bankruptcy laws would be subverted if Acquisition were found to be a legal successor in this case, and that the rulings of the Bankruptcy Court in approving the sale to Holdings effectively preclude imposing any liability on Holdings.

1. The acquisition successorship issue

General Counsel's argument that Acquisition had an obligation to recognize and bargain with the Guild as a "legal successor" is founded on *NLRB v. Burns,* 406 U.S. 272 (1972). In that case, the successor employer replaced a previous employer providing guard service without changing either the operational structure or the practices of the enterprise, and the successor hired a majority of the previous employer's employees. The Supreme Court held that the Act required the successor to bargain with the union which represented a majority of the employees and with which the previous employer had signed a collective bargaining agreement. However, the successor was not bound by the previous contract.

Numerous cases since *Burns* have defined the circumstances when a new employer has a duty to bargain with the previously recognized or certified representative of its employees. All of these cases begin by analyzing the following language which the Court used to define the duty to bargain of a successor:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit. . . . [406 U.S. at 294–295.]

There is no contention that Acquisition made significant changes in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product, and services at the *Post* sufficient to interrupt the continuity of the employer after March 29, 1993. See, *Woodrich Industries, Inc.,* 246 NLRB 43 (1979). Rather, the conditions under which Acquisition managed the paper give rise to the challenge to its status as a *Burns* successor with a duty to bargain under the Act.

The General Counsel argues that when Acquisition began managing the *Post* on March 29, 1993, it became a *Burns* successor. General Counsel relies on a line of cases where a *Burns* successorship was found even though the successor did not yet own the business when the bargaining obligation arose. The cases begin with *East Belden Corp.,* 239 NLRB 776 (1978). In *East Belden*, a California restaurant was being sold and the deal was placed in escrow. The buyer and seller executed a sales agreement and an escrow agreement which gave detailed instructions to a designated escrow holder concerning the implementation of the terms of the sales agreement. On the day these documents were signed, the buyer obtained a temporary license to serve liquor and all of the other business licenses necessary to operate in the buyer's name. The day after the agreements were signed, the buyer took control of the business and began to operate the restaurant, introducing itself to employees and the public as a new owner. The sales agreement and the escrow agreement provided that the escrow holder had possession of the buyer's consideration during the escrow period. Escrow would last until the buyer obtained a permanent liquor license and certain property transactions were completed. When these conditions were fulfilled, the escrow holder would disburse the consideration to the seller. If the liquor license could not be obtained, the escrow would be terminated and all money returned to the buyer. For the duration of the escrow period, the buyer paid rent to the seller. During the escrow, the buyer assumed "full management and control" of the restaurant, all books and records were in its name and it expected to make a profit of the business: the seller exercised no control over the restaurant. At the beginning of the escrow, the buyer retained all of the employees who were represented by the union, and it applied virtually the same terms and conditions of employment as had existed under the seller. The restaurant did not change its method of operation and it did not change its name. The Board upheld without comment the ALJ's ruling that on the day the buyer took control of the restaurant it was a successor and it was obligated to recognize and bargain with the employees' collective bargaining representative despite the fact that it had not yet obtained legal title to the business.

In a case much like *East Belden*, the Board upheld the ALJ's finding that a prospective long term lessee who operated a hotel under an "interim management agreement" pending the conclusion of negotiations for the lease was a successor with an obligation to recognize and bargain with the hotel employees' union. *Sorrento Hotel,* 266 NLRB 350 (1983). The hotel had been operated by a lessee who had fallen on economic hard times and eventually abandoned the premises. While the former lessee was preparing to leave, the prospective lessee and the owner of the hotel agreed on the basic terms of their new lease. A delay in the proceedings arose when the title report showed many encumbrances on the property which had to be cleared before the formal lease could be signed. The ALJ found that after the basic terms of the lease had been worked out, the lessee's "prolonged continuation in that role was a virtual certainty." 266 NLRB 357 In anticipation of a successful conclusion, the owner and the prospective lessee agreed that the lessee would "take over the management" of the hotel for 120 days or until the earlier signing of the long term lease. The prospective lessee made no changes in the hotel at first, except to appoint its own manager. The interim management agreement provided that the prospective lessee was operating the hotel for the benefit of the owner and that it could not retain any excess cash flow. Despite the language of the agreement, the prospective lessee obtained all the tax and liquor license documents required to operate the hotel in its own name, it provided the initial cash required to begin operations on the day it took over and it opened bank accounts to which it alone had access. The hotel manager reported solely to the prospective lessee and the owner of the hotel played no part in its management. The ALJ concluded that the prospective lessee had become a successor on the day it took over management of the hotel.

The Board discussed *East Belden* and *Sorrento Hotel* in *Fremont Ford Sales*, 289 NLRB 1290 (1988). The ALJ in *Fremont* had relied on *East Belden* and *Sorrento* to rule that a successor had a duty to bargain with the employees' union before an auto dealership was sold to a new corporation formed by the part owner-manager of the previous owner. Months before the new corporation came into existence, the prospective buyer discussed the sale with other officers of the previous owner and with the Ford Motor Co. which was to provide financing for the new corporation under its dealer development program. Before the new corporation was formed, the negotiations among the previous owner, the prospective buyer and the Ford Motor Co. culminated in the granting of an option to Ford Motor Co. to buy the dealership. Ford was given the right to assign the option to the new corporation to be formed by the prospective purchaser. One month later, after Ford Motor Co. formally approved the deal, the new corporation was formed, whereupon it proceeded to adopt bylaws, issue stock and take all the other steps required to do business. The ALJ found that the duty to bargain as a successor, based on the control of the old dealership by the prospective purchaser who was its part owner and manager, dated either from the time the prospective owner began negotiations with the old dealership or from the time the options to purchase were granted to the Ford Motor Co. The Board held that the ALJ erred in relying on *East Belden* and *Sorrento Hotel* to conclude that a successorship was created before the sale went through. The Board distinguished the facts in those cases from the facts in *Fremont* as follows:

> The salient facts in *East Belden* and *Sorrento Hotel* triggering successorship status before the purchase was final or the lease commenced are that there were written agreements to purchase or lease and an escrow or interim management period officially established for the prospective buyer or lessee to take control. Here there was no written agreement to purchase or lease the dealership in existence ... and no escrow or transitional period. The execution of the buy-sell and lease agreements by the Respondent and the transfer of the dealership property occurred almost simultaneously and there was no interim agreement for the Respondent to operate the dealership. [289 NLRB at 1294.][28]

The rule announced in *Fremont* is clear. The Board requires a written contract of sale or lease and a precisely defined interim management period, during which the manager exercises effective control in its own name and which will be used to fulfill mere formalities, before a prospective lessee or a prospective purchaser can be deemed a successor with a duty to bargain.[29]

I am bound by the rule adopted by the Board in *Fremont* and I shall proceed to apply that rule to the facts of the instant case.[30]

The General Counsel argues that Acquisition became a legal successor to The New York Post Co., Inc., on March 29, 1993. On that day, Acquisition began managing the *Post* pursuant to the management agreement approved by the Bankruptcy Court. On that date, there was no contract for Acquisition to purchase the assets of the *Post*, and Acquisition had no duty to purchase the paper. Before March 29, 1993, Acquisition had announced that it would not purchase the paper unless the FCC granted a waiver and the employees, through their unions, agreed to changed terms of employment. Even if these conditions were met, the Bankruptcy Court might, for a variety of reasons, fail to approve a purchase by Acquisition or its affiliate. Further, it was possible that another company would bid for and buy the assets of the paper with the approval of the Bankruptcy Court. Under the terms of the management agreement, Acquisition could not realize a profit from its management of the *Post*: if its operation of the paper had miraculously produced a profit, that would have gone to The New York Post Co., Inc. During the management period, Acquisition lost no opportunity to inform employees of the paper that it was not a permanent owner and that its participation as a manager was only for the purpose of determining whether new conditions could be established so that a sale might be made to a new owner. The Bankruptcy Court Order of June 30, 1993, extended the management agreement so that NAPI could determine whether the labor negotiations would be concluded on terms acceptable to NAPI and whether, in the judgment of NAPI, the operation of the *Post* would be economically viable. NAPI had not yet made an offer to acquire the assets and the views of the Debor and of the Creditors Committee on any such future offer had not been established. Acquisition had the right to terminate the management agreement on three days notice and, in fact, it exercised this right on July 6. The Guild was well aware that a purpose of the management period was to permit negotiations with the Creditors Committee and with the unions for the establishment of new conditions. The Guild knew that NAPI had announced that if it did not reach new agreements with all the unions it would not purchase the paper; if the Guild negotiations with representatives of the potential new owner were not successful, Guild members would not have jobs at the *Post.* Further, the Guild had told NAPI negotiators that its members would refuse to work unless they were given severance pay guarantees and third party review of dismissals. Thus, the Guild contemplated that there might likely be circumstances that could result in the end of the newspaper.

Moreover, more than mere formalities remained after Holdings was incorporated and the proposed agreement to purchase the assets of The New York Post Co., Inc., was approved by the Bankruptcy Court on September 14, 1993. The new contracts with the unions had not been ratified and executed. No agreement had been reached in the negotiations between Holdings and the Guild, and the Guild's position was still that its members would refuse to work for the paper if there were no third party review during the evaluation process and if the new owner did not assume the severance obligations. When the Guild deadline of September 27 passed without agreement and the other unions honored the Guild picket line, the newspaper was closed. The *Post* did not publish editions on September 28, 29 or 30. The NAPI negotiators had told the Guild that if its strike prevented the publication of the paper, Holdings would not purchase The New York Post Co., Inc., assets. Under the asset purchase agreement, Holdings had the right to refuse to close the deal if it did not achieve satisfactory contracts with all of the unions. While the paper was closed, it could hardly be said that a purchase was likely and that only mere formalities remained to be completed during the management period. In fact, on those days it was less likely than ever that Holdings would purchase the *Post.* Not until the night of September 29, when the other 10 unions agreed to cross the Guild picket line was the possibility of a purchase revived. The actual purchase did not take place until after it was shown on September 30 that the employees would report to work and the paper could be published. Thus, the asset purchase closed and new collective

[28] The Board erred in saying that there was a written agreement to lease in *Sorrento Hotel*. The ALJ there had found that there was no written lease, only basic agreement on a long term lease and a "virtual certainty" that it would be signed. This mistake is of no moment in discussing the Board's reasoning, however, because the significance of the Board's discussion lies in the Board's belief that there was in fact a written lease.

[29] Indeed, a clearly defined rule is desirable, as can be seen by reading the cited cases. In all of these cases, the dealings among the various parties were of such a complicated nature that, without a clearly defined rule, neither union, employees nor the corporate entities themselves could have any reliable idea when the duty to bargain as a successor might validly be invoked. Significantly, even after an exhaustive and precise analysis of the facts, the ALJ in *Fremont* felt obliged to give two possible dates for the commencement of the successorship.

[30] The General Counsel has not taken a position on the applicability of *Fremont Ford* to the instant case and has not discussed the language quoted above.

bargaining agreements were signed with the 10 unions on October 1.

Under the rule announced by the Board in *Fremont,* I am constrained to find that Acquisition was not a successor with a duty to bargain on March 29, 1993, as urged by the General Counsel.[31] There was no written agreement to purchase the assets of Post Co. and there was no obligation on the part of Acquisition or NAPI to make such a purchase. There was no interim management period officially established for the pospective buyer to take control and during which mere formalities would be fulfilled.

2. The request to bargain on September 28 and 29, 1993

I credit Lipton that he telephoned Purcell twice during the strike, on September 28 and 29, to ask that bargaining continue. From Lipton's description of the events, I find that both of his calls were made before Murdoch and the NAPI negotiators met with the other 10 unions during the night of September 29 and decided to reopen the *Post* based upon the promise to cross the Guild picket line. The General Counsel urges that Respondent's failure to resume negotiations with the Guild in response to Lipton's calls was an unlawful refusal to bargain.

When parties are at impasse, their duty to negotiate is suspended. The duty to bargain is not revived until the occurrence of an intervening circumstance that would be likely to affect the existing impasse or renew the possibility of fruitful discussion. *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 775 (1990). It is the duty of the party requesting bargaining based on changed circumstances to inform the opposite side of changes in its negotiating position. *Serramonte Oldsmobile Inc. v. NLRB*, 86 F.3d 22 (D.C. Cir. 1996).

The General Counsel and the Respondent agree that the Guild and the NAPI negotiators were at impasse in their negotiations. The description of the bargaining between the parties given above shows that they were at impasse over subcontracting, assumption of the severance obligation, and the Union's demand for third party review of dismissals during the probationary period. By September 27, the NAPI negotiators had no new proposals for the Guild, and Lipton had stated repeatedly that Guild members would not work without third party review of dismissals. Nothing happened in the relations between the parties after 4pm on September 27 to change the state of impasse. Indeed, on September 29, when officials of the Allied asked Lipton to return his members to work, Lipton replied that his members would not go back to work unless he had an agreement in principle about third party review of probationary dismissals. Thus, it is clear that the positions of the parties and their willingness to make concessions had not changed during the strike from September 27 to 29. In these circumstances, even if I had found that Acquisition had a duty to bargain as a successor employer I would not find that Respondent unlawfully refused to bargain with the Guild on September 28 and 29 when Lipton asked Purcell to resume negotiations.

3. Refusal to bargain and withdrawal of recognition

The General Counsel argues that when Faris by letter of September 30 and October 5 refused to bargain with the Guild and withdrew recognition, Respondent violated Section 8 (a) (1) and (5) of the Act.[32] General Counsel urges that as the *alter ego* of the successor Acquisition, Holdings had a duty to recognize and bargain with the Guild. General Counsel contends that Holdings' sole reason for withdrawing recognition and refusing to bargain was that the Guild members were on strike.

The Respondent argues that Holdings, as the successor to The New York Post Co., Inc., had a right under *Burns* to hire a new workforce and set initial terms and conditions of employment. If the majority of employees eventually hired by Holdings was not made up of former Guild unit members, then Holdings would not have a duty to recognize and bargain with the Guild. Moreover, Respondent urges, even if Acquisition were found to be a successor, thereby moving up the date on which the *Burns* rules apply, Acquisition always made it clear that once the sale of the *Post* closed, the terms and conditions of employment would be different from those in the contract with The New York Post Co., Inc. Acquisition never misled the employees into believing that they would all be retained without a change in working conditions. Respondent further argues that if Acquisition is deemed to be a successor of The New York Post Co., Inc., Holdings is not the *alter ego* of Acquisition because that would require a finding that Holdings is also a single employer with Acquisition.

Soon after *Burns* was decided, the Board discussed the right of a successor to set initial terms of hire in light of the "perfectly clear" exception articulated by the Court. In *Spruce Up Corporation,* 209 NLRB 194 (1974), a new employer offered the predecessor's unionized employees employment at rates of pay different from those they had enjoyed under the predecessor. On the first day that the new employer was in operation, a majority of the employees set up a picket line and they did not report for work. The new employer hired replacement employees and, initially, the replacements outnumbered the union-represented predecessor's employees. The Board discussed the import of the "perfectly clear" exception in *Burns*. The Board found that the exception to the proposition that a new employer may ordinarily set initial terms of hire did not apply where "an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms. . . ." 209 NLRB at 195. The Board reasoned that the old employees might not want to work under the new terms announced by the new employer and thus it might not be "perfectly clear" that the new employer could plan to retain all the employees in the unit. The new employer would not have a duty to bargain before it was determined that a majority of the former, unionized, employees had indeed accepted employ-

[31] All of my conclusions in this case flow from the rule articulated in *Fremont* and they follow inexorably from the finding, which is compelled by the rule of that case, that on March 29, 1993, Acquisition was not a successor to The New York Post Co., Inc. The Respondent's brief argues that the General Counsel's issuance of the instant Complaint amounts to an effort to persuade the Board to change the law. Whatever the merits of the attempted change may be, I am bound to follow the Board law as I find it.

[32] The letter of October 5 was reiterated on November 3 in response to a further bargaining request from the Guild on October 27.

ment. *Spruce Up* was enforced without published opinion at 529 F.2d 516 (4th Cir. 1975).

I have found above that Acquisition was not a successor of The New York Post Co., Inc. There is no dispute, however, that Holdings is a successor employer. Pursuant to *Burns* and *Spruce Up*, Holdings had the right to announce that it was hiring employees under different terms and conditions from those in the old Post Co. contract. Holdings exercised this right. From the beginning of the Post Co. bankruptcy proceedings in March, and continuing through September, 1993, NAPI representatives made it clear that eventual purchase of the paper and its survival as an employer depended upon setting new terms and conditions for the paper's employees. As set forth above, on September 30, the day before Holdings purchased the assets of Post Co., Faris informed Lipton that Holdings did not intend to assume the collective bargaining agreement of its predecessor and that Holdings would hire as a new employer and establish its own initial terms and conditions of employment. The facts show that a majority of the employees hired by Holdings to perform work formerly performed by the Guild unit are not former Guild represented employees of the *Post*. Thus, there is no basis for finding that Holdings had a duty to bargain with the Guild on September 30, October 5 or November 3.

It is true that the slate of corporate directors and officers of Acquisition and Holdings were practically identical on October 1, 1993, the day Holdings purchased certain of the assets of The New York Post Co., Inc. Further, the same managers who had run the *Post* while Acquisition managed the paper continued their duties after Holdings became the owner on October 1. As has been amply demonstrated in the record, Acquisition and Holdings are wholly owned subsidiaries of NAPI and all of these entities are ultimately controlled by Murdoch. There can be no dispute that Acquisition and Holdings had substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. I find that Holdings is the *alter ego* of Acquisition. *Crawford Door Sales,* 226 NLRB 1144 (1976). Although there has been no showing that Holdings was formed with an illegal purpose to avoid a duty to bargain under the Act, such a finding is not necessary to the application of the *alter ego* doctrine. *Goodman Piping Products, Inc.,* 741 F.2d 10, 12 (2d Cir. 1984). However, I have not found, as alleged by General Counsel, that on March 29, 1993, Acquisition was a successor to The New York Post Co., Inc., with a successor's duty to bargain with the Guild. It follows that Holdings could not have any duty to bargain deriving from its status as an *alter ego* of Acquisition.

General Counsel's brief also argues that Acquisition, Holdings and NAPI constitute "a single-integrated employer." I note that the Complaint alleges only that Acquisition and Holdings are a single employer. Given my view of the facts and the law, it is not necessary to decide this issue because a finding that it is a single employer with Acquisition would not impose any greater obligation on Holdings than a finding of *alter ego*. I am reluctant to enter the dispute concerning the ultimate relationship between the concepts of single employer and *alter ego* signalled by *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994), and discussed by Member Raudabaugh in the underlying decision which was not enforced by the court, *Johnstown Corp.*, 313 NLRB 170, 172 (1993). I note that the Second Circuit favors a separate analysis of the two concepts. *Lihli Fashions Corp. v. NLRB*, 80 F.3d 743, 748 (1996). Pursuant to *Lihli Fashions*, I believe that it is proper to find that Holdings is an alter ego of Acquisition without also deciding whether Holdings is a single employer with Acquisition.

In an effort to show that the NAPI negotiators acknowledged that Holdings was legally obligated to maintain the conditions of the old contract and to continue to recognize and bargain with the Guild, General Counsel relies on the two conversations testified to by Lipton concerning his queries about what would happen if no agreement were reached with the Guild by the time the sale of assets closed. I credit Lipton that he spoke to O'Neill on September 14 at the Bankruptcy Court and that O'Neill said that Holdings would either continue to apply the terms of the collective bargaining agreement or post conditions. Lipton's recollection of this conversation was specific and O'Neill's response was consistent with the NAPI negotiators' intent expressed that day to go through with the purchase even if no Guild contract had been reached. The negotiators wanted to Guild employees to keep working so that the paper could be published and all concerned hoped for a successful contract settlement. Similarly, I credit Lipton that either Faris or Price said at one of the last bargaining sessions that they had not decided what would happen if no agreement were reached and that they might continue the existing terms or post conditions. However, these comments do not amount to an acknowledgment, as General Counsel contends, that Holdings was legally bound to honor the existing agreement or keep negotiating. The management negotiators' comments reflected that they had not decided what would happen and that they had two alternatives in mind. But there is no admission here and certainly no admission that the conditions to be posted had to reflect NAPI's last offer. Lipton himself did not seek to bind O'Neill, Faris or Price to these statements during the strike or its aftermath by reminding them of any purported admission or promise. Although the Guild *Bulletin* quoted above attacked Murdoch for stealing Guild jobs, it did not attack him for reneging on a promise to maintain existing conditions of employment or post conditions identical to his last offer. In fact, General Counsel's brief concedes that these conversations are "irrelevant."

When Holdings became the owner of the *Post* on October 1, 1993, the Guild unit was on strike. Lipton had told the NAPI negotiators that his members were striking the *Post* and that they would refuse to work for the paper if their severance pay entitlements were not guaranteed by Holdings and if there were no third party review of dismissals during the evaluation period. Holdings, as a successor to The New York Post Co., Inc., had a right, as set forth in *Burns*, to hire a new work force and set initial terms and conditions of employment. Faris' letter of October 30 states Holdings' intention to exercise its rights as a new employer. Thereafter, Holdings proceeded to hand out applications for employment and it hired new employees, including a number of people who had worked for the *Post* in the former Guild unit.[33] There is no contention that Holdings discriminated in its hiring of these individual applicants. As a successor, Holdings had no duty to recognize and bargain with the Guild unless it hired a majority of employees in the former Guild unit. General Counsel does not contend that Holdings is required to recognize and negotiate with the Guild based on its hiring after October 1. Therefore, it was not a violation of the Act for Holdings to fail to recognize and fail to negotiate with the Guild after October 1, 1993, and it was not a violation to establish new terms and conditions for the newly hired employees.

4. Alleged termination and refusal to reinstate

Before the sale of assets closed on October 1, Faris issued a memorandum to Guild unit members urging them to work even if the Union called a strike. However, the Guild members struck because they did not wish to work under the conditions that the NAPI negotiators had demanded. The Guild members were exercising their right under the Act to put economic pressure on the prospective owner of the paper in order to force the prospective owner to accede to their desires. When Holdings closed the asset purchase and became the owner of the *Post* on October 1, the Guild unit was still on strike. On October 1, Holdings as a successor had the right to hire a new work force and this it proceeded to do. I cannot find that Holdings discharged striking Guild members because I cannot find that these individuals were ever employees of Holdings. It follows that Holdings did not discharge the striking Guild unit members nor refuse to reinstate them in violation of the Act.

The General Counsel points out that Holdings signed contracts with the 10 other unions on October 1, 1993, and did not require the employees in the 10 other units to apply for jobs. General Counsel attributes this difference in treatment to unlawful discrimination and anti union animus on the part of Holdings. However, the employees in the 10 other units had agreed to work for Holdings under new terms and conditions which were acceptable to both employer and employees. In many of those units, numbers of positions would be eliminated once the contracts became effective. Holdings had exercised its right as a successor to hire them under new terms and conditions and the employees had accepted. The Guild represented employees had not agreed with the NAPI negotiators on new terms and conditions to be applicable once Holdings closed the asset purchase, and the Union had reiterated the employees' position that they would not work for Holdings without the severance pay and third party review provisions demanded by the Guild. Indeed, the strike called by the Guild in advance of the asset purchase closing on October 1 was further proof of the employees' determination not to work for Holdings under the conditions demanded by the NAPI negotiators. Thus, I do not find that Respondent discriminated unlawfully against the Guild unit members.

CONCLUSIONS OF LAW

1. The General Counsel has not proved that Respondent violated the Act as alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The complaint is dismissed.

[33] The record does not disclose how many former Guild unit members applied for work with Holdings nor what proportion of those who applied were actually hired.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.